116

No. D 08 891

In The

Supreme Court of the United States

JEFFREY D. BURR,

Petitioner,

v.

WILLIAM J. POLLARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

BEAU MCGRAW
Counsel of Record
600 Inwood Avenue North,
Suite 200
Oakdale, MN 55128
Telephone: (651) 209-3200
Facsimile: (651) 209-0550
beau@mcgrawlawfirm.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Did the trial court violate Jeffrey Burr's Fifth Amendment right to remain silent when it used his silence against him during the sentencing phase at his trial as justification for determining that Jeffrey would not be eligible for extended supervision release from prison for a term of 60 years?

2. Did the trial court unreasonably apply clearly established federal law, as determined by the Supreme Court of the United States, by taking into account material that had been ordered stricken from Jeffrey's pre-sentence report when determining that he would not be eligible for extended supervision release from prison for a term of 60 years?

3. Is Jeffrey entitled to resentencing because of the due process errors committed by the trial court at his sentencing?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the Court below is *Burr v. Pollard*, 546 F.3d 828 (7th Cir. 2008) (App. 1). The cases leading up the Seventh Circuit Court of Appeals Decisions are: *Burr v. Bertrand*, 2007 WL 4561114 (E.D.Wis. 2007) (App. 40); *Burr v. Bertrand*, 2007 WL 3228830 (E.D.Wis. 2007) (App. 10); *State v. Burr*, 266 Wis.2d 694 (Wis.App. 2003) (App. 44); *State v. Burr*, 2002 WL 34395132 (Wis.Cir. 2002) (App. 70).

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered on October 15, 2008 by the United States Court of Appeals, Seventh Circuit. *Burr v. Pollard*, 546 F.3d 828 (7th Cir. 2008). This Court has jurisdiction to hear this review because said action properly arose under 28 U.S.C. §2254 and was properly appealed to the Seventh Circuit Court of Appeals under 28 U.S.C. §2253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be

twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST. amend. V.

28 U.S.C. §2254 (2007) is reproduced verbatim in the appendix to this section (App. 71).

STATEMENT OF THE CASE

On March 26, 2001, Petitioner-Appellant Jeffrey Daniel Burr was charged in connection with the death of Ronald Ross, whose body was found in rural Pepin County, Wisconsin on March 9, 2001. Mr. Burr, who had just turned 15 years old, was charged along with his cousins Noah and Arlo White. Mr. Burr went to trial first before the Honorable Dane F. Morey, Pepin County Circuit Court. The jury convicted Mr. Burr under the party-to-the-crime theory of first-degree murder, aggravated battery and false imprisonment.

The Court sentenced Mr. Burr to life imprisonment for the first-degree murder count declaring that Mr. Burr would be eligible for release to extensive supervision after 60 years and to concurrent sentences of 15 and 5 years for the aggravated battery and false imprisonment.

Mr. Burr then filed his Notice of Intent to Pursue Postconviction Relief. Thereafter, he filed with the

circuit court a Motion to Modify Sentence. Mr. Burr contended that information contained in his Pre-Sentence Investigation labeling him as a bully was inaccurate. The PSI included allegations that Mr. Burr had bullied Andy Rush for a year. Mr. Burr had adamantly denied the allegations and moved to either delete the allegations or, in the alternative, for an evidentiary hearing on the issue. The Court decided to strike the allegations rather than hold a hearing on the issue. However, when the Court sentenced Mr. Burr, the allegations relating to bullying were still included in the PSI report used and the Court stated that "[a]ll through school and his contact with other kids, he's been a bully." (App. 97-99).

Additionally, Mr. Burr based his Motion to Modify Sentence on the grounds that the sentencing court declared that Mr. Burr would not be eligible for release to extensive supervision for 60 years on the fact that Mr. Burr had shown no "remorse or repentance in this case." (App. 102-103). When Mr. Burr was interviewed by the drafter of the PSI, Mr. Burr, on the advice of counsel, did not comment on his version of the offense. This was a strategic decision made in light of upcoming postconviction relief and any possible future appeals, as any statements made by Mr. Burr in such an interview would be useable against him in any future new trial.

The court also stated in the sentencing hearing of Jeffrey's codefendants that "[f]urthermore, contrasting to Mr. Burr, as far as your culpability, is that

Mr. Burr took no responsibility. He did not say one word in this court. He never acknowledged any guilt whatsoever." Mr. Burr specifically raised this issue in terms of the fact that Mr. Burr had remained silent under the advice of his attorney in light of future appeals and possible retrials and that it was unfair for the court to consider the fact Mr. Burr had followed his attorney's advice not to testify, as it had nothing to do with a lack of remorse, but was based on the fact that in any future trial, the words Mr. Burr gave would be used against him. (App. 131-132). The court denied the motion to modify sentence, stating it was "a matter for the Court of Appeals to handle" at that point. (App. 135).

Mr. Burr raised these same two issues regarding due process errors in his sentencing on direct appeal to the Court of Appeals of Wisconsin. In an unpublished opinion, the Wisconsin Court of Appeals held, regarding the issue of the trial court using information that was redacted from the PSI when determining Mr. Burr's sentence, that Mr. Burr's due process rights had been violated. *State v. Burr*, 266 Wis.2d 694, 10 (Wis.App. 2003). That court determined that the trial judge had in fact relied upon the information that was to have been redacted from the report because the sole reference to Mr. Burr bullying other children was in the section that had not been redacted, but should have been. However, that court also determined that this due process violation had been harmless as the trial court had also taken into

account other factors in determining Mr. Burr's sentence.

As to the issue of the trial court's reliance on Mr. Burr's lack of testimony in determining the length of time before Mr. Burr would be eligible for extensively supervised release, the court held that the trial court had not been punishing Mr. Burr for asserting his right not to testify. *Id.* at 11. The court further noted that the sentencing judge had taken into account three other factors, in addition to lack of remorse, in determining Mr. Burr's sentence. *Id.*

The Wisconsin Supreme Court denied Mr. Burr's request for review of these issues. *Burr v. Pollard*, 546 F.3d 828, 831 (7th Cir. 2008). Mr. Burr then filed a habeas corpus petition pursuant to 28 U.S.C. §2254 with the Federal District Court, Eastern District of Wisconsin. This District Court held that the Wisconsin Court of Appeals had not unreasonably applied federal law as determined by the United States Supreme Court. *Burr v. Bertrand*, 2007 WL 3228830 (E.D.Wis. 2007). As to Mr. Burr's argument that his due process rights had been violated when he was punished for *not* testifying, the District Court held the trial court had used the proper issue of remorsefulness of the defendant, of which failure to testify in part to determine the length of Mr. Burr's sentence, and therefore the actions of the trial court and the decision of the Wisconsin Court of Appeals had not been unreasonable applications of clearly established federal law. *Id.*

After his habeas petition was denied by the District Court, Mr. Burr sought a certificate of appealability, which is necessary to give the United States Court of Appeals jurisdiction to hear an appeal of a denial of a habeas petition. 28 U.S.C. §2253. Mr. Burr sought a certificate of appealability as to a number of issues, including the sentencing issues raised below. He was granted a certificate of appealability as to the due process issues related to imposition of a sentence based upon impermissible information and the fact he had asserted his constitutional right not to testify. *Burr v. Bertrand*, 2007 WL 4561114 (E.D.Wis. 2007).

The Seventh Circuit Court of Appeals affirmed the decision of the District Court. *Burr v. Pollard*, 546 F.3d 828 (7th Cir. 2008). The Seventh Circuit held that the District Court, and the lower courts below it, had not unreasonably applied clearly established federal law because the inclusion of the bullying section in Mr. Burr's PSI had been harmless as the trial judge stated he did not take that section into account in sentencing Mr. Burr. *Id.* at 831. Additionally, the Seventh Circuit held that the lower courts had not unreasonably applied clearly established federal law, stating that "silence can be consistent not only with exercising one's constitutional right, but also with lack of remorse." *Id.* at 832.

Mr. Burr now seeks review of the decision of the Seventh Circuit Court of Appeals, said decision being

properly in front of that Court pursuant to 28 U.S.C. §2254 and §2253.

REASONS FOR GRANTING THIS PETITION

This case presents several important constitutional issues. The first is whether it is a violation of a criminal defendant's Fifth Amendment right not to testify against himself, to use that defendant's silence, both during trial, and at sentencing as a negative inference which is used to justify a longer sentence. The second question is whether a defendant is entitled to resentencing when the sentencing court relied on two pieces of information in sentencing the defendant that were both due process violations. The Seventh Circuit Court of Appeals answered the first question in the negative. This ruling was erroneous. The Seventh Circuit did not have occasion to answer the second question due to finding in the negative as to the first question.

The question of whether it violates a defendant's Fifth Amendment right to remain silent to use his silence against him in sentencing is a question which this Court specifically left open for another day in *Mitchell v. United States*, 526 U.S. 314 (1999). As this Court has not set forth a final and determinative ruling on this issue, a lack of uniformity in the interpretation of just what rights the Fifth Amendment provides a criminal defendant has arisen. This lack of uniformity in interpretation of the Fifth Amendment

of the United States Constitution makes this an issue which is ripe for Supreme Court review at this time. Without such review, the important question of whether a defendant's silence at trial and sentencing, a right he is guaranteed under the Fifth Amendment of the United States Constitution will depend upon the varying interpretations the Federal Courts of Appeals and State Courts give to the Fifth Amendment protections.

Jeffrey's Right to Due Process Was Violated

1. Jeffrey's Fifth Amendment Right to Remain Silent Was Violated.

The Fifth Amendment of the United States Constitution protects the rights of a criminal defendant to remain silent at his trial. U.S. CONST. amend. V. This protection extends to sentencing of a defendant as "[t]he concerns which mandate the rule against negative inferences at a criminal trial apply with equal force at sentencing." *Mitchell*, 526 U.S. at 330. However at the time this Court decided the *Mitchell* case, it declined to answer the question of whether a defendant's silence bore upon the determination of a defendant's lack of remorse or acceptance of responsibility for the purpose of sentencing. *Id.* The question presented in this case is whether it violates a defendant's Fifth Amendment right to remain silent to use that silence against the defendant in any manner in his sentencing, which is precisely the question preserved in *Mitchell*.

The Seventh Circuit Court of Appeals determined that a defendant asserting his Fifth Amendment Due Process right to remain silent at trial is a factor that the trial court can use against the defendant because "silence can be consistent not only with exercising one's constitutional rights, but also with lack of remorse." *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008) (citing *Bergmann v. McCaughtry*, 65 F.3d 1372, 1379 (7th Cir. 1995)). However, that Court also noted that "sometimes it is difficult to distinguish between punishing a defendant for remaining silent and properly considering a defendant's failure to show remorse in setting a sentence." *Bergmann*, 65 F.3d at 1397 (citing *United States v. Johnson*, 903 F.2d 1084, 1090 (7th Cir. 1990)). When referring to using silence as a factor in determining remorse and simply using the defendant's silence to punish him that "[t]he line between legitimate and the illegitimate, however, is a fine one." *Burr v. Pollard*, 546 F.3d at 832. In this case, that line was blurred in such a way that Mr. Burr's due process rights were violated and resentencing with proper application of Mr. Burr's right of silence is the only remedy.

The Seventh Circuit erred in determining that it is not a Fifth Amendment violation to use a defendant's silence against him in sentencing. To allow a trial court to consider a defendant's silence adversely, a right considered among the most fundamental of all a defendant's trial rights, at sentencing places a defendant who chooses to remain silent in an impossible position and our Founders knew it. A defendant who asserts his right to remain silent at trial, yet is

convicted, under the Seventh Circuit rule, must essentially forfeit his right to remain silent at sentencing, also guaranteed by the Fifth Amendment, in order to avoid having that fundamental right used against him.

In *Mitchell*, this Court determined that a defendant's right to remain silent at sentencing is just as important as his right to remain silent at trial when it stated "the rule against negative inferences at a criminal trial apply with equal force at sentencing." *Mitchell*, 526 U.S. at 330. Prior to the *Mitchell* decision, in *Griffin v. California*, this Court firmly established that a defendant's silence could not be used to determine his guilt, going so far as to analogize allowing comments on a defendant's failure to testify as stepping back into the "inquisitorial system of criminal justice." *Griffin v. California*, 380 U.S. 609, 614 (1965) (quoting *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55 (1964)). The *Griffin* Court detailed several reasons why a defendant's silence, as guaranteed by the Fifth Amendment, could not be used against him.

First, this Court noted that to allow a defendant's silence to be used against him was to impose a penalty on that defendant for asserting a fundamental right that the defendant is unconditionally entitled to, noting that "[i]mposing such a penalty 'cuts down on the privilege by making its assertion costly.'" *Id.* Additionally, and of incredible relevance in the present case, the *Griffin* Court further noted that a defendant deciding not to testify during trial is often based on considerations other than guilt or innocence when it noted that fear of impeachment by prior

crimes was a reason a defendant who could exculpate himself might not testify. *Id.*

It follows naturally that because a defendant may choose not to testify at trial for considerations other than guilt, making a negative inference as it relates to guilt based on the defendant's silence is inappropriate as it is nothing more than a guess as to the defendant's motives. Given what is at stake in a criminal proceeding, often the defendant's very life and liberty, a decision based on a guess is unacceptable and not representative of fundamental fairness. As such, this Court has declared that such a practice is prohibited. *Griffin*, 380 U.S. at 614. Allowing a sentencing court to take a negative inference of any form from a defendant's assertion of his right to remain silent must be prohibited.

There are a multitude of reasons why a defendant may choose not to speak during the sentencing portion of his trial. Despite the fact a defendant has been convicted, he may choose to remain silent, and then not accept responsibility or show remorse for his crime in the eyes of the sentencing court for any number of reasons completely unrelated to lack of remorse. For example, he may maintain his innocence, and actually be innocent, which would mean it was necessary for the defendant to make statements that are untrue, thereby committing perjury. Also, a defendant may remain silent, with or without the advice of counsel, because he understands that if he

decides to make any postconviction motions or appeals that lead to a new trial his words at sentencing could be used against him in any subsequent trial. Or, perhaps, a defendant may remain silent simply because the defendant lacks the tools or confidence to speak in such an imposing environment despite the fact he feels a great deal of remorse.

Whatever the reason a defendant remains silent, trial court taking such silence into consideration in determining the defendant's sentence is doing nothing more than guessing as to the reason for the defendant's silence.

Additionally, regardless of a defendant's reason for choosing to remain silent during the sentencing portion of trial, to allow the sentencing court to take a negative inference from that silence, no matter how slight, chills a defendant's ability to assert the fundamental privilege to remain silent. To allow the trial court to use the defendant's silence against him makes the defendant pay a price for asserting his right to remain silent. A defendant's right to remain silent, and put the state to its burden of proof at all stages of the criminal process, is the very backbone of the United States criminal justice system. Any practice that places a burden on a defendant for asserting a right that is his unconditionally cannot be upheld in a system of justice that strives for fundamental fairness and due process. The Supreme Court of Montana properly addressed the issue when it stated

that a sentencing court cannot be allowed to consider a defendant's silence in imposing sentence because "[t]o allow sentencing courts to do otherwise would force upon the defendant the Hobson's choice . . . which is condemned by the Fifth Amendment . . . specifically that the defendant must either incriminate himself at the sentencing hearing and show remorse (with respect to a crime he claims he did not commit) or, in the alternative, stand on his right to remain silent and suffer the imposition of a greater sentence." *State v. Shreves*, 60 P.3d 991, 996-97 (Mont. 2002).

The reasons against allowing the trial judge to make a negative inference at sentencing based upon a defendant's silence are exactly the same as the reasons that judges and juries are not allowed to take a negative inference from a defendant remaining silent at trial. This Court unequivocally stated so in the *Mitchell* case when it declared "[t]he rule against negative inferences at a criminal trial apply with equal force at sentencing." *Mitchell*, 526 U.S. at 330. A defendant, who is entitled to the very same right to remain silent at sentencing as he is during trial, should be entitled to the very same protection at sentencing as he was at trial. His right to remain silent, and the right not to be punished for asserting this unconditional right, must be as scrupulously guarded during sentencing as it is during trial. Allowing a sentencing court to consider a defendant's

silence lack of remorse because it is only a slight due process violation is not fundamentally fair and does not comport with due process and allowing a sentencing court to do so is to chip away at the protection the Fifth Amendment provides.

The fact that sentencing courts allege to take silence into consideration only as part of determining the remorse of a defendant does not make considering that factor any less of a due process violation. When the defendant's silence is used in any manner in determining his sentence, be it directly or indirectly, as the lower courts allege it is when it is done through the label of lack of remorse, his Fifth Amendment right to remain silent is infringed and the resulting sentence cannot be allowed to stand. Anything less renders the *Mitchell* decision, and through it, the *Griffin* decision useless.

2. The trial court violated Jeffrey's due process rights at sentencing by taking into account material that was stricken from the record in determining the length of Jeffrey's sentence and that violation was not harmless, especially given the trial court's negative influence drawn from Jeffrey's assertion of his Fifth Amendment right to remain silent as a justification for a longer sentence.

The Wisconsin Court of Appeals determined that Jeffrey's due process rights were violated when the trial court relied upon portions of the PSI that should have been redacted due to their disputed accuracy.

State v. Burr, 266 Wis.2d 694, 2003 WL 21448558 (Wis.App. 2003). However, that court also concluded that the trial court's error was harmless, noting that the sentencing court's comments focused primarily on "the crime's brutal nature and Burr's primary role, lack of remorse, antisocial tendencies, aggressive and violent nature, history of discipline problems, and substance abuse." *Id.* The Seventh Circuit Court of Appeals upheld the decision of the Wisconsin Court of Appeals, noting that error was harmless. *Burr v. Pollard*, 546 F.3d 828, 831-32 (7th Cir. 2008). It is soundly established that in taking into account information that should have been redacted from the PSI, the trial court violated Jeffrey's due process rights during his sentencing; this is established by the decisions of the lower courts.

Having established that the trial court violated Jeffrey's due process rights, the question that remains is whether such violation resulted in harmless error. Both the Wisconsin Court of Appeals and the Seventh Circuit Court of Appeals determined that the trial court's due process violation was harmless as it related to Jeffrey's sentence due to the fact the trial court had taken into account other factors as well.

Both courts erred, the Wisconsin Court of Appeals in denying Jeffrey's direct appeal and the Seventh Circuit Court of Appeals in denying Jeffrey habeas relief due to the fact they viewed the issues of

the trial court's using improper information of Jeffrey's bullying and the fact the trial court used Jeffrey's silence against him separately. As the Wisconsin Court of Appeals pointed out, the sentencing judge relied upon five factors besides Jeffrey's being a bully in sentencing him. 266 Wis.2d at 10. However, when it is taken into account that one of those factors was Jeffrey's lack of remorse, based on the fact he failed to testify during trial or speak at his sentencing hearing, it becomes clear that Jeffrey's 60 year prohibition on extensively supervised release was based on improper factors, thus making it fundamentally unfair. As the sentencing judge listed five (5) factors in justifying Jeffrey's sentence, 40% of the reasons the sentencing judge listed are unconstitutional. 40% is not harmless error. The combined impact of the sentencing court relying on two improper sources of information in determining Jeffrey's sentence means that nearly half of said justifying information was used in violation of Jeffrey's due process rights. Such an error is hardly harmless by any standard used.

This case presents issues this Court should address

1. This case presents an important question regarding the United States Constitution that has not been but should be settled by this Court.

The question of whether a defendant's silence can be taken into account by a judge in determining the defendant's sentence as part of a defendant's remorse is a question that has not yet been answered by this Court. This Court expressly declared it was not deciding this issue in the *Mitchell* case. *Mitchell*, 526 U.S. at 330. *Mitchell* may not have been the proper case for making such a decision, as the sentencing court explicitly stated it was basing the sentence on the fact that the defendant had failed to come forward and give her side of the story. *Id.* at 319. In *Mitchell* it was clear the sentencing court was basing its decision directly on the defendant remaining silent and was not purporting to take silence into consideration as part of remorse or acceptance of responsibility, making the determination of the issue in the present case unnecessary at that time.

The present case presents no such impediment to making the determination of whether it violates a defendant's Fifth Amendment right to remain silent during the sentencing stage of his trial to use that silence as part of determining whether the defendant showed remorse or took responsibility for the crime. Here the sentencing court used the defendant's silence to determine that he had not shown remorse.

The manner in which the sentencing court used the defendant's silence makes this a case where the issue reserved in *Mitchell* is front and center, making this the proper case and time for this Court to answer the important question it reserved judgment on in *Mitchell*.

2. In the absence of a Supreme Court ruling the lower federal courts and state courts have developed conflicting and contradictory interpretations of the protections the Fifth Amendment provides a defendant at sentencing resulting in a lack of uniformity.

A Supreme Court ruling on this issue would clarify the scope of the Fifth Amendment as it relates to a defendant's right to remain silent. Additionally, such a decision would foster uniformity in federal constitutional interpretation. Currently, lower federal courts and state courts have varying interpretations of the protection the Fifth Amendment provides to a defendant during the sentencing stage of a trial.

As to the issue expressly left open in *Mitchell*, the Seventh Circuit Court of Appeals has determined that it is not a Fifth Amendment violation for a sentencing judge to consider a defendant's silence at trial and sentencing when making the determination of whether the defendant has shown the sort of remorse that would warrant a lesser sentence. See *United States v. Johnson*, 903 F.2d 1084 (1990); *Bergmann v. McCaughtry*, 65 F.3d 1372, 1379 (7th Cir. 1995).

Without Supreme Court guidance, lower federal courts and state courts have given differing interpretations to the protection of the Fifth Amendment, and this lack of uniformity could be prevented by a ruling from this Court. In a thorough analysis of this issue, the New Hampshire Supreme Court noted, citing a number of cases from the Federal Circuit Courts of Appeals, that a majority of the circuits felt that a sentencing judge could take into account a defendant's silence in determining his sentence because under the Federal Sentencing Guidelines to do so was not a punishment, but was simply withholding a benefit. *State v. Burgess*, 156 A.2d 727, 736 (N.H. 2008).

Despite this fact, a number of state courts have interpreted the Fifth Amendment, correctly, to protect a defendant from having his silence used against him in any negative form at sentencing. The Nevada Supreme Court noted that it is a Fifth Amendment violation to use a defendant's silence as a negative factor in sentencing in any form, as a defendant who chooses to remain silent and maintains his innocence is unable to express remorse without forgoing his right under the Fifth Amendment not to incriminate himself. *Brake v. State*, 939 P.2d 1029, 1033 (Nev. 1997). The Montana Supreme Court held that to be consistent with the state and federal constitutions, a sentencing court could not use a defendant's silence against him, even as a part of determining whether the defendant showed remorse. *State v. Shreves*, 60 P.3d 991, 996 (Mont. 2002). That court also noted,

citing *Griffin v. California*, that while remorse is a factor that can be considered in determining a defendant's sentence, it would not be consistent with this Court's ruling in *Griffin* to allow a defendant's silence to be a part of that consideration of remorse. *Id.*

Other state courts have also determined that in light of the reasoning in the *Griffin* and *Mitchell* decisions, that the Fifth Amendment of the United States Constitution does not allow a defendant's silence at sentencing to be used against him in any manner. See *State v. Burgess*, 943 A.2d 727, 735-36 (N.H. 2008) (deciding that under the New Hampshire version of the Fifth Amendment, which provides similar protections as the Fifth Amendment of the United States Constitution, that to use a defendant's silence against him in sentencing, no matter what the sentencing court alleges it is doing, is really punishing the defendant for asserting his right to remain silent and thus cannot be allowed); *Brake v. State*, 939 P.2d 1029, 1033 (Nev. 1997) (holding that because a defendant who asserts his Fifth Amendment right to remain silent cannot express remorse for the crime without forgoing that right to remain silent and incriminating himself, using that defendant's lack of remorse against him is a Fifth Amendment violation); *State v. Young*, 987 P.2d 889, 894-95 (Colo.Ct.App. 1999) (holding that it was a Fifth Amendment violation for the sentencing court to use a defendant's decision not to testify against him in determining his lack of remorse because a defendant that asserts his Fifth Amendment right to remain

silent would have no opportunity to express remorse and cannot be punished for asserting such a right); *State v. Hardwick*, 905 P.2d 1384, 1391 (Ariz.Ct.App. 1995) (citing *State v. Carriger*, 692 P.2d 991, 1011 (Ariz. 1984), cert. denied, 471 U.S. 1111 (1985)) (holding that "[a] convicted defendant's decision not to publicly admit guilt is irrelevant to a sentencing determination, and the trial court's use of this decision to aggravate a Defendant's sentence offends the Fifth Amendment privilege against self-incrimination"); *State v. Williams*, 389 S.E.2d 830, 833 (N.C.Ct.App. 1990) (holding that a defendant "exercising the right against self incrimination cannot be an aggravating factor in the defendant's sentence" in a case where the sentencing judge stated the length of the sentence was based in part in the fact the defendant, who had asserted his Fifth Amendment right to remain silent, had not said anything to show remorse for his crime).

These courts have properly recognized that to use a defendant's silence against him, even in some small manner, is inconsistent with the Fifth Amendment and due process. Allowing a defendant's constitutionally guaranteed silence to be used against him places a burden on that defendant for asserting that right. Doing so places a chill on the defendant's ability to assert his right to remain silent by making it costly. In order to ensure that the Fifth Amendment of the United States Constitution continues to serve its intended purpose, to make the state have to prove the defendant guilty without help from the defendant,

it is necessary to extend the logic of the *Griffin* decision to entirely cover every aspect of the trial process and prohibit sentencing courts from using a defendant's decision to assert his right to remain silent against him in any form. Only a decision from this Court is capable of providing uniformity in this direction.

CONCLUSION

The Fifth Amendment of the United States Constitution provides that a criminal defendant has the right to remain silent at all stages of his trial and also that he is entitled to due process. To allow a sentencing court to take a defendant's silence into account in determining whether he has shown remorse places a burden on the defendant's Fifth Amendment right and does not comport with due process and fundamental fairness. Sentencing courts must not be allowed to take a defendant's silence into consideration in sentencing. It is time for this Court to make this the uniform Constitutional rule across the nation. To allow lower federal courts and state courts to apply a rule to the contrary serves only to weaken the Fifth Amendment and by extension the entire idea of fundamental fairness on which the

United States system of criminal justice is based. The petition for a writ of certiorari should be granted.

Dated: January 13, 2009

Respectfully submitted,

McGraw Law Firm, P.A.

Beau McGraw
Attorney for Petitioner
600 Inwood Avenue North,
Suite 200
Oakdale, MN 55128
Telephone: (651) 209-3200
Facsimile: (651) 209-0550
beau@mcgrawlawfirm.com

INDEX TO APPENDIX

United States Court of Appeals, Seventh Circuit.
546 F.3d 828

Jeffrey D. BURR, Petitioner-Appellant,
v.
William J. POLLARD, Respondent-Appellee.
No. 07-4031.

Argued Sept. 11, 2008.
Decided Oct. 15, 2008.

Earl P. Gray (argued), Gray & Malacko, St. Paul, MN, for Petitioner-Appellant.

Marguerite M. Moeller (argued), Office of the Attorney General, Madison, WI, for Respondent-Appellee.

Before EASTERBROOK, Chief Judge, and POSNER and EVANS, Circuit Judges.

EVANS, Circuit Judge.

On a March day in 2000, loggers working in rural Pepin County, Wisconsin, found a dead, nearly naked body lying in the snow. Hypothermia was evident, but Mother Nature was not the cause of death. As a subsequent investigation discovered, the body was that of Ronald Ross, a man who several other men assaulted at a house party two days earlier in Red Wing, Minnesota. The body was left for dead in Wisconsin that night. Jeffrey Burr, 15 years old at the time, was the chief assailant. He attacked Ross at the party and suggested slitting his throat as he and three confederates drove the unconscious Ross to Wisconsin. When Ross came to during the drive, Burr

beat him with a machete. After Burr and his companions unloaded Ross from the SUV they were using, two of the men went back to the car, but Burr and one other stayed with Ross, kicking him several times. Upon returning to the SUV, Burr said they had "killed him."

A Wisconsin state court jury convicted Burr of first-degree murder.[1] Under Wisconsin law, a defendant convicted of first-degree murder must serve a life sentence. Wis. Stat. §§ 940.01(1), 939.50(3)(a). The judge, however, can influence the actual time of confinement by setting an eligibility date for "extended supervision." *See* Wis. Stat. § 973.014(1g)(a). When an inmate is released on extended supervision, he still serves his sentence, but in a different manner – outside the prison walls. *See State v. Larson*, 268 Wis.2d 162, 166, 672 N.W.2d 322, 324 (Wis.Ct.App.2003) ("[T]he term extended supervision . . . means supervision of an individual not incarcerated."). Extended supervision, therefore, is synonymous with "supervised release," a term used by federal courts. *See, e.g., United States v. Hatten-Lubick*, 525 F.3d 575, 581-82 (7th Cir.2008).

An eligibility date for extended supervision became an issue at Burr's sentencing. The presentence report stated Burr bullied a boy named Andy

---

[1] He was also convicted of aggravated battery and false imprisonment.

Rush in school.[2] Burr disputed that allegation, and his attorney asked the court to strike the information or hold an evidentiary hearing to determine its validity. The judge went with option one, stating that he would not consider the allegation for sentencing purposes. Yet, when it came time to announce the sentence, that ruling apparently slipped his mind. The judge remarked, "All through school and his contact with other kids, [Burr has] been a bully." After recounting the events concerning the beating and murder of Ross, the judge imposed the mandatory life term and ordered that Burr would be eligible for "extended supervision" after 60 years, in 2061.

The judge subsequently refused to modify the sentence, stating that he premised the extended supervision date on the fact that it was a "brutal murder," and 60 years would ensure that Burr "would be old enough when he got out that he couldn't hurt anyone else." The judge said he did not consider the bullying issue "as a factor at sentencing."

Burr also contended in his motion to modify that the judge punished him for exercising his right to remain silent. Burr did not take the stand at trial, and he declined to say any thing during the sentencing hearing. The judge at sentencing said he was disturbed that Burr didn't show "one ounce of remorse or repentance" and had an "absolutely flat

---

[2] The details of those encounters are not in the record before us.

affect" in his court appearances. As the judge saw it, Burr failed to exhibit "tenderness towards anybody on the stand."

Later, the judge handed out lighter sentences (at least in terms of extended supervision) to Noah and Arlo White, two brothers who were also convicted of Ross's murder. There, the judge contrasted their actions in court with those of Burr. The White brothers, who pleaded guilty, would be eligible for earlier extended supervision because they acknowledged their crimes. Burr, on the other hand, "took no responsibility. *He did not say one word in this court.* He never acknowledged any guilt whatsoever."

Burr sought relief in the Wisconsin Court of Appeals. *State v. Burr,* 266 Wis.2d 694, 2003 WL 21448555 (Wis.Ct.App. June 24, 2003). The Wisconsin Court of Appeals agreed that the sentencing judge erred with respect to the bullying issue, but Burr's victory was superficial. The court concluded that the error was harmless at best because the judge's comments at sentencing "focus[ed] primarily on the crime's brutal nature and Burr's primary role, lack of remorse, antisocial tendencies, aggressive and violent nature, history of discipline problems, and substance abuse." Burr had even less success with a Fifth Amendment argument. The appellate court decided that the sentencing judge properly considered Burr's lack of remorse and gave due weight to that factor. The Wisconsin Supreme Court denied a request for review.

With his state court remedies exhausted, Burr filed a habeas corpus petition with the federal district court.[3] The district court dismissed Burr's petition, concluding that the "bullying" reference was not necessarily based on the same information stricken by the judge – the stricken information referred to a specific individual; the judge at sentencing said Burr bullied "kids" – and, in any event, the appellate court's harmless error analysis was consistent with Supreme Court precedent. The court further rejected the Fifth Amendment claim, explaining that the finding of no remorse rested upon circumstances other than mere silence. Burr now appeals the dismissal of his petition.

We review the district court's factual findings for clear error and its legal conclusions *de novo*. *Rizzo v. Smith*, 528 F.3d 501, 505 (7th Cir.2008). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a petitioner is entitled to habeas relief when a decision of the state court is either "contrary to" or "an unreasonable application of" clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A decision is "contrary to" Supreme Court precedent when it relies on a rule that conflicts with that precedent or reaches a different result in a

---

[3] Magistrate Judge Aaron E. Goodstein presided with the consent of the parties.

similar case. *Williams,* 529 U.S. at 412-413, 120 S.Ct. 1495. A state court unreasonably applies clearly established law if it "identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 413, 120 S.Ct. 1495. In either event, error alone is not sufficient; a state court's decision must be "objectively unreasonable." *Lockyer v. Andrade,* 538 U.S. 63, 76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Burr renews his claim here that his due process rights were violated when the judge considered the "bullying" allegation after striking it from the record and that his Fifth Amendment rights were infringed when the judge enhanced the confinement component of his sentence because he remained silent.

Taking the issues in turn, Burr contends the state court of appeals applied the wrong standard of review in resolving the "bullying" claim. The appellate court said the sentencing judge's error was harmless because there was "no reasonable *probability*" – as opposed to "possibility" – that it resulted in a longer period of incarceration. As Burr points out, the Supreme Court has held that courts conducting harmless error review on direct appeal should determine whether the error was "harmless beyond a reasonable doubt." *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Nevertheless, we agree with the district court that the state appellate court meant to, and more importantly did, apply the *Chapman* standard. Second, and more important, *Chapman* is neither here nor there. Just

two terms ago, the Supreme Court held that under AEDPA a federal habeas court is to apply the more forgiving "substantial and injurious effect" standard from *Brecht v. Abrahamson*, 507 U.S. 619, 638, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), when it identifies a constitutional error, regardless of whether the state court recognized the error and reviewed it for harmlessness beyond a reasonable doubt under *Chapman*. *Fry v. Pliler*, ___ U.S. ___, 127 S.Ct. 2321, 2328, 168 L.Ed.2d 16 (2007). So the standard varies depending on whether the challenge is made on direct appeal or collateral review, and the state court made no mistake when it applied *Chapman*. Regardless, the question for us is whether the trial judge's consideration of a stricken statement in the PSR had a "substantial and injurious effect" on Burr's sentence. It did not. The judge's reference to Burr's history as a bully was little more than an afterthought; the judge considered a number of factors in reaching his decision, but the driving force was the brutal nature of the beating and subsequent murder, not Burr's runins with a particular classmate in school. Burr's attorney told us at oral argument that the bullying factor "*had* to have a substantial effect" on the eligibility date. But the record doesn't compel that conclusion; instead it supports the state appellate court's finding of harmless error. The district court properly denied habeas relief on this ground.

So, too, did the district court reach the right result with respect to the Fifth Amendment claim. The Fifth Amendment protects an accused's right to

remain silent at trial and sentencing. *Mitchell v. United States,* 526 U.S. 314, 326-27, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999). That right, of course, would mean little if a judge could punish a defendant for invoking it. *United States v. Turner,* 864 F.2d 1394, 1405 (7th Cir.1989). Nevertheless, silence can be consistent not only with exercising one's constitutional right, but also with a lack of remorse. The latter is properly considered at sentencing because it speaks to traditional penological interests such as rehabilitation (an indifferent criminal isn't ready to reform) and deterrence (a remorseful criminal is less likely to return to his old ways). *See Bergmann v. McCaughtry,* 65 F.3d 1372, 1379 (7th Cir.1995). The line between the legitimate and the illegitimate, however, is a fine one. As we have recognized, "sometimes it is difficult to distinguish between punishing a defendant for remaining silent and properly considering a defendant's failure to show remorse in setting a sentence." *Bergmann,* 65 F.3d at 1379 (citing *United States v. Johnson,* 903 F.2d 1084, 1090 (7th Cir.1990)). But this is not one of those difficult cases. Viewing the record in its entirety, it is plain that the judge was bothered by Burr's lack of sympathy – which can be expressed in a variety of nonverbal ways – rather than his silence. The judge's remark to Burr's codefendants that Burr failed "to say one word in this court" only has force when viewed out of context. Considering the record as a whole, it was simply another way of noting Burr's lack of remorse. Perhaps the judge could have chosen better words, but the Constitution is not violated by a mere slip of

the tongue. Accordingly, the state appellate court's decision rejecting this argument was neither contrary to nor an unreasonable application of federal law.

The district court's order denying Burr's petition for a writ of habeas corpus is AFFIRMED.

United States District Court, E.D. Wisconsin.

Jeffrey Daniel BURR, Petitioner,

v.

Warden Daniel BERTRAND, Respondent.

No. 04-C-992.

Oct. 31, 2007.

Earl P. Gray, Gray & Malacko Law Offices, Saint Paul, MN, for Petitioner.

Marguerite M. Moeller, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI, for Respondent.

DECISION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

AARON E. GOODSTEIN, U.S. Magistrate Judge.

On October 12, 2004, Jeffrey Daniel Burr ("Burr"), a person incarcerated pursuant to a state court judgment, proceeding with the assistance of counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 19, 2004, the Honorable Thomas J. Curran screened Burr's petition in accordance with Rule 4 of the Rules Governing Section 2254 Cases and ordered the respondent to answer the petition. This case was then transferred to this court upon all parties consenting to the full jurisdiction of a magistrate judge. The pleadings on Burr's petition are closed and the matter is ready for resolution.

PROCEDURAL HISTORY

Following a jury trial, on February 20, 2002, Burr was convicted of first-degree intentional homicide, aggravated battery, and false imprisonment, all as a party to the crime. (Ans.Ex.A.) Burr appealed and the court of appeals affirmed his conviction in an unpublished opinion dated June 24, 2003. (Ans.Ex.E.) The Wisconsin Supreme Court denied review on October 27, 2003. (Ans.Ex.F.)

FACTS

The following facts are contained in the court of appeals' decision in this case. As the court of appeals noted, these facts are taken from the testimony of Paul Jackson, the only person who testified at trial directly connecting Burr to the victim's death.

> On March 9, 2000, loggers found the dead, nearly naked body of Ronald Ross along a road in Pepin County. The investigation into Ross's death revealed that Ross had been at the Treasure Island Casino near Red Wing, Minnesota, on March 7 and 8. A surveillance videotape showed Ross talking to and eventually leaving the casino with a group of nine persons. Two of these people were identified as cousins Paul and David Jackson, who had registered at the casino hotel.
>
> Police eventually contacted David at the casino, where he was an employee. He did not provide any information about Ross's

death. David and Paul then contacted an attorney and subsequently told investigators that Ross had been murdered and offered to provide details in exchange for immunity. The police agreed, and the information they provided eventually led to fifteen-year-old Burr's arrest, along with Noah and Arlo White.

At trial, Paul testified that he went to a party at Noah's house in Red Wing early in the morning of March 9. Burr, the Whites, David and Ross were all at the party. Paul testified that he argued with Ross in the basement approximately two hours after he arrived at the party. Paul said he punched Ross in the chin and knocked him to the floor. According to Paul, the party quickly began to break up and he went upstairs to "cool down."

Approximately forty-five minutes later, Burr and Noah asked Paul to go to the garage. Paul did, and in the garage he saw an unconscious Ross lying on the ground covered by a blanket. Paul testified that Burr then kicked Ross in the back and that they placed Ross in the back of Arlo's sport utility vehicle. Burr and Paul sat in the back seat, Noah in the front passenger seat, while Arlo drove to Wisconsin. On the ride, Burr said they should kill Ross and suggested slicing his throat. After entering Wisconsin, Ross regained consciousness. Paul said that Burr grabbed a sheathed machete and hit Ross with it for five minutes.

> The men stopped the vehicle on a Pepin County logging road. Burr, Paul and Noah unloaded Ross from the vehicle, dropping him on the ground. Paul went back to the vehicle while Burr and Noah kicked Ross for several minutes and left him on the road. Back in the vehicle, Burr said, "We killed him." The men drove back to Minnesota. At trial, the Ramsey County, Minnesota, medical examiner who performed Ross's autopsy testified that the cause of death was multiple blunt force trauma and that hypothermia was a contributing factor.

State v. Burr, 2003 WI App 162, ¶¶ 2-6 (unpublished) (footnote omitted).

Burr presents seven claims for relief in his petition: (1) the trial judge was biased against the defense resulting in a violation of Burr's due process right to a fair trial; (2) the prosecutor misstated evidence and testified during his closing argument which violated Burr's due process right to a fair trial; (3) Burr's right of confrontation was violated when he was denied the opportunity to cross-examine an immunized state witness about whether the witness was aware that the charge he was avoiding carried a mandatory sentence of life in prison; (4) the trial court improperly excluded the prior statements of witness; (5) the court failed to instruct the jury that a person cannot be criminally liable for the actions of another if he is merely a bystander; (6) Burr's sentence was based upon false information; and (7) Burr

was penalized at sentencing for exercising his right against self-incrimination.

STANDARDS OF REVIEW

Where the state court adjudicates the merits of a petitioner's claim, this court may grant habeas corpus relief if the state court decision:

> (1) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

As the Supreme Court explained in *Williams v. Taylor,* § 2254(d)(1) establishes two independent grounds on which a federal court can grant habeas corpus relief: (1) if a state court decision is "contrary to" clearly established federal law, as determined by the Supreme Court; or (2) if a state court decision involves an "unreasonable application" of clearly established federal law, as determined by the Supreme Court. 529 U.S. 362, 404-05, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see also Washington v. Smith,* 219 F.3d 620, 627-28 (7th Cir.2000). The "contrary to" standard requires a state court decision to be "substantially different from the relevant precedent of

[the Supreme Court]." *Williams,* 529 U.S. at 405. For example, a state court decision applying a rule that contradicts the governing law set forth by the Supreme Court would qualify, as would a decision that involves a set of facts materially indistinguishable from a Supreme Court case that arrives at a different result. *Id.* at 405-06. By contrast, a state court decision that draws from Supreme Court precedent the correct legal rule and applies it in a factually distinguishable situation will not satisfy the "contrary to" standard, no matter how misguided the decision's ultimate conclusion. *Id.* at 406-07.

Under the "unreasonable application" prong of (d)(1), relief may be granted if the petitioner shows that, despite identifying the correct rule of law, the state court unreasonably applied it to the facts of the case. *Williams,* 529 U.S. at 404. An unreasonable application of federal law, however, is different from the incorrect or erroneous application of federal law. *Boss v. Pierce,* 263 F.3d 734, 739 (7th Cir.2001) (citing *Williams,* 529 U.S. at 410). A federal court simply disagreeing with the state court decision does not warrant habeas relief – the decision's application of Supreme Court precedent must be so erroneous as to be objectively unreasonable. *Middleton v. McNeil,* 541 U.S. 433, 436, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004); *Yarborough v. Gentry,* 540 U.S. 1, 5, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).

Under § 2254(d)(2), relief may be had where the petitioner demonstrates that the state court made an unreasonable determination of the facts in light of the

evidence presented in the state court proceeding. Here again, an unreasonable determination is more than a determination that is simply incorrect or erroneous. Moreover, state court factual determinations are presumed correct, and the petitioner has the burden of rebutting the presumption of correctness by "clear and convincing evidence." § 2254(e)(1). *Rice v. Collins,* 546 U.S. 333, 339, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006) (citing *Miller-El v. Dretke,* 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005)).

With the § 2254(d) and (e)(1) standards in mind, the court will now turn to the issues raised by Burr.

ANALYSIS

Judicial Bias

Burr alleges that the judge demonstrated bias against the defendant by displaying partiality toward the prosecutor and by unfairly denigrating or chastising the defense or defense counsel. (Pet. Br. at 8.) In support of his claim, Burr sets the context of the trial. Burr, a Native-American, was tried in a small Wisconsin town where he did not live. (Pet. Br. at 8.) Burr's defense counsel primarily practiced in Minnesota and had never appeared before the trial judge, whereas the prosecutor and the judge were well-acquainted. (Pet. Br. at 8.) Further, many of the jurors knew the prosecutor and the judge. (Pet. Br. at 8.)

To specifically support his claim that the judge was partial towards the prosecution, Burr points to numerous points in the trial where the trial judge allegedly assisted the prosecutor in properly framing questions following defense objections, (Pet. Br. at 9), limited defense questioning after permitting the prosecution to pursue the same line of questioning, (Pet. Br. at 10), improperly sustained prosecution objections, (Pet. Br. at 10-13), called a recess to permit a prosecution witness to consult with the prosecution during cross-examination, (Pet. Br. at 13), and took over the questioning of a witness during the defense's cross-examination, (Pet. Br. at 14).

To support his claim that the judge unfairly denigrated or chastised defense counsel, Burr points to the fact that the judge said, "I think what is sauce for the goose is sauce for the gander," after the defense made and then withdrew an objection to a prosecution question, (Pet. Br. at 14), said, "The jury will determine that. And what [defense counsel] says is not evidence. He's not a witness in this case. And I'll admonish both counsel not to argue in front of the jury," after the defense objected to an alleged misstatement of testimony, (Pet. Br. at 15), said "Don't say, 'That's right' That's stricken. Any statements of counsel, including [defense counsel's] statements are stricken and are not part of the record. They are not witnesses," after defense counsel objected to a prosecutor saying "That's right" in response to a witness' answer, (Pet. Br. at 15), asked defense counsel not to object every time there was some minor inconsistency

in the prosecutor's closing argument and stated that he would give the prosecution and the defense reasonable latitude in making closing arguments, (Pet. Br. at 15-16), admonished defense counsel for yelling at a witness and the tone of his voice during cross-examination, (Pet. Br. at 16, 17), did not permit defense counsel to cross-examine an immunized witness that he avoided a potential life sentence by obtaining immunity and instead stated that the jury may not consider the consequence of its verdict in reaching its decision, (Pet. Br. at 17), admonished defense counsel to cease asking argumentative questions, (Pet. Br. at 18), and refused to recuse himself from hearing post-trial motions, (Pet. Br. at 18).

The court of appeals determined that when the incidents cited by Burr are reviewed in context, there was no indication that the court was biased against the defendant. 2003 WI App 162, ¶¶ 14-18.

"[T]he Due Process Clause clearly requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bracy v. Gramley,* 520 U.S. 899, 904-05, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997) (citations omitted). "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him." *Edwards v. Balisok,* 520 U.S. 641, 647, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) (citing *Tumey v. Ohio,* 273 U.S. 510, 535, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *Arizona v. Fulminante,* 499 U.S. 279, 308, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *See United States v. Grinnell Corp.*, 384 U.S. [563,] 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 [(1966)]. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), a World War I espionage

> case against German-American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are reeking with disloyalty." *Id.*, at 28 (internal quotation marks omitted). Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's ordinary efforts at courtroom administration – remain immune.

Liteky v. United States, 510 U.S. 540, 555-56, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

Burr fails to demonstrate that any of the judge's comments, either alone or when viewed together, even when read without the benefit of their context, demonstrate that the trial judge was biased against him. At the very most, certain of the judge's comments may be regarded as mild demonstrations of impatience, dissatisfaction, or annoyance, but the Supreme Court has explicitly held that such ordinary actions do not constitute judicial bias. There is absolutely no indication that any of the arguable negative feelings the judge may have felt towards the defendant emerged from an extrajudicial source or were so deep-seated so as to make a fair trial impossible. Therefore, this court is unable to conclude that the decision of the Wisconsin Court of Appeals was

clearly contrary to or involved an unreasonable application of federal law as determined by the United States Supreme Court.

Prosecutorial Misconduct

Burr alleges that at numerous points in his closing and rebuttal arguments, the prosecutor testified, adding evidence that was not supported by the evidence adduced at trial. (Pet. Br. at 24-25.)

The court of appeals held that although it would have been improper for the prosecutor during his closing argument to offer his own testimony as to what happens to a credit card when thrown, the court noted that defense counsel objected before the prosecutor offered improper testimony and this objection was sustained. 2003 WI App 162, ¶ 24. As for Burr's argument that the prosecutor improperly testified when he said that attorneys do not assist clients in concocting lies, based upon the context, the prosecutor was merely asking the jury to call upon their common knowledge to reject Burr's claim. *Id.* at ¶ 23. Even if this was improper, the court held that Burr failed to demonstrate this comment so infected his trial so as to violate his right to due process. *Id.*

Although the court of appeals addressed only these two instances of alleged prosecutorial misconduct occurring in the prosecutor's closing, Burr raises numerous other grounds in his present petition. These additional grounds were raised in Burr's recitation of facts in his brief to the court of appeals,

(Ans. Ex. B at 19-22), but the court of appeals limited its review to the incidents raised in the argument portion of his brief, 2003 WI App 162, ¶ 22.

> The leading Supreme Court decision on the question whether prosecutorial misconduct is so egregious that a new trial is required, as a matter of constitutional law, is *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). In *Darden,* the Court set forth six factors that should be considered in deciding this question: (1) whether the prosecutor misstated the evidence, (2) whether the remarks implicate specific rights of the accused, (3) whether the defense invited the response, (4) the trial court's instructions, (5) the weight of the evidence against the defendant, and (6) the defendant's opportunity to rebut. 477 U.S. at 181-82.

Howard v. Gramley, 225 F.3d 784, 793 (7th Cir.2000)

Even if a defendant is able to demonstrate that multiple of the *Darden* factors cut in his favor, a finding of prosecutorial misconduct does not automatically follow. *Id.* Rather, the most important factor is the weight of the evidence against the defendant. *Id.*

In this case, Burr failed to properly develop his arguments with respect to the numerous other alleged grounds of prosecutorial misconduct not considered by the court of appeals. As such, Burr waived these arguments, and as a consequence of this waiver before the court of appeals, Burr has

procedurally defaulted these claims before this court. *See Curry v. Farrey*, 2007 U.S. Dist. LEXIS 56380, 6-10 (E.D.Wis.2007) (citing *Hashim-Tiggs v. Schneiter*, 2007 U.S. Dist. LEXIS 4180, 27-34 (E.D.Wis.2007); *Speener v. Smith*, 2002 U.S. Dist. LEXIS 27903, 12 (E.D.Wis.2002)). Therefore, this court's review is limited to those two specific instances of alleged prosecutorial misconduct addressed by the court of appeals.

With respect to the prosecutor's statements regarding how credit cards fall, as the court of appeals observed, the prosecutor was stopped as a result of defense counsel's objection before he could offer any improper testimony. As for the prosecutor's comments regarding the conduct of attorneys, when viewed in isolation, this may appear to be improper testimony, but when viewed in context, it is clear, as the court of appeals determined, that the prosecutor is merely calling upon the jury to utilize their common sense and experience to reject the defendant's argument.

Even if this court were to consider Burr's additional arguments not addressed by the court of appeals, this court finds that these statements, when viewed in isolation or together, were insufficient to deprive Burr of a fair trial, particularly in light of the weight of the evidence against the defendant. Therefore this court is unable to conclude that the decision of the court of appeals was contrary to or involved an unreasonable application of federal law as determined by the United States Supreme Court.

Right to Confrontation

Burr alleges that his right to confront his accuser was violated when the court did not permit his attorney to cross-examine Paul Jackson regarding the fact that Paul Jackson avoided a possible life sentence by obtaining immunity for his testimony. (Pet. Br. at 32.) When defense counsel asked Paul Jackson if he was aware that a conviction for first-degree intentional homicide requires a life sentence, the court cut him off and the prosecutor objected. (Pet. Br. at 32.) Defense counsel argued that this line of questioning was relevant with respect to the witness' credibility, but the state argued that Burr was attempting to persuade the jury to ignore the evidence and acquit the defendant out of sympathy for the defendant and fear of the consequences of its verdict. (Pet. Br. at 32.) Notably, at the time of the murder and his trial, the defendant was only fifteen-years-old. (Ans.Ex.A.)

The court of appeals held that even if there was error in the trial court's refusal to permit this cross-examination, it was harmless, because the fact that life imprisonment is the punishment for first-degree intentional homicide is common knowledge. 2003 WI App 162, ¶ 29. In fact, Burr's defense attorney explicitly acknowledged that such information is common knowledge when he was presenting the objected-to question. *Id.*

A criminal defendant's right to confront his accusers is violated when he shows that he was prohibited from engaging in otherwise "appropriate

cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." *Delaware v. Van Arsdall,* 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (internal quotation marks and ellipses omitted). However, a defendant is not entitled to relief if the state is able to show beyond a reasonable doubt that the error did not contribute to the verdict. *Id.*

Given the context, it was understandable that the trial court would be quick on the trigger in sustaining the state's objection to defense counsel's question; an attorney representing a fifteen-year-old charged with first-degree intentional homicide may look for ways to gain sympathy from the jury, such as alerting them to the fact that a conviction would require a mandatory sentence of life in prison. In hindsight, it appears that the state and the court misunderstood the intent behind defense counsel's question; it was not that Burr's attorney was intending to garner sympathy, but rather was attempting to impeach the witness who had been granted immunity. Of course, this was not necessarily clear to the court at the moment in the midst of cross-examination.

The court of appeals held that because the punishment for first-degree intentional homicide is common knowledge, a fact that defense counsel acknowledged even as he was presenting the question to the witness, there was no chance that any error contributed to the jury verdict. The jury was

well-aware of the consequences that the witness avoided in obtaining immunity, regardless of the restriction upon the cross-examination. Furthermore, the jury was still able to factor in the grant of immunity in its credibility assessment. Therefore this court is unable to conclude that the decision of the court of appeals was contrary to or involved an unreasonable application of federal law as determined by the United States Supreme Court.

Exclusion of Statement

Burr alleges that the trial court's decision refusing to permit him to submit the statement of David Jackson wherein he told Ashley Getty to get rid of the phone number that he called her from the night before because the phone was stolen and person whose phone it was, was dead (Pet. Br. at 43) violated his Sixth Amendment right to present a defense. Burr argues that this statement was circumstantial evidence corroborating the defense theory that Paul Jackson was responsible for the murder. (Pet. Br. at 43.)

The court of appeals acknowledged that this statement was not hearsay, because it was not offered for the truth of the matter, but rather to prove David Jackson knew of the murder. 2003 WI App 162, ¶ 35. However, the court of appeals concluded that any error was harmless because nothing David Jackson said implicated Paul Jackson in the murder any more than Paul Jackson's own testimony. *Id.*

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Ky.*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (internal citations and quotation marks omitted). "This right includes the right to call witnesses on their own behalf and to cross-examine witnesses who have testified on the government's behalf." *Cal. v. Trombetta*, 467 U.S. 479, 486 n. 6, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) (citing *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

Although, as the court of appeals acknowledged, the testimony Burr sought to elicit was admissible, the trial court's refusal to permit the testimony was harmless error. The Supreme Court has repeatedly stated "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *See, e.g., Van Arsdall*, 475 U.S. at 681 (citing *United States v. Hasting*, 461 U.S. 499, 508-09, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968)). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. Cal.*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

As the court of appeals recognized, Paul Jackson's own testimony was sufficiently incriminating and provided an explanation for Paul Jackson to know that the victim was dead and also an explanation of how David Jackson would have acquired this knowledge. In no way did David Jackson's knowledge that the victim was dead create circumstantial evidence that Paul Jackson was responsible for the murder or, more importantly, that Burr was not involved. Thus, the state has demonstrated that the court's error in denying admission of the evidence was harmless beyond a reasonable doubt. Therefore this court is unable to conclude that the decision of the court of appeals was contrary to or involved an unreasonable application of federal law as determined by the United States Supreme Court.

Bystander Jury Instruction

Burr argues that the court's sua sponte refusal to give the bystander jury instruction in conjunction with the party to a crime jury instruction on the basis that the court saw no evidence to support such an instruction, violated Burr's right to due process. (Pet. Br. at 48-47.) Burr argues that this deprived him of a stronger theory of defense, i.e. that he was present during the crime but did not have any criminal intent and did nothing to assist in the crime. (Pet. Br. at 49.)

The court of appeals held that the trial court correctly refused to give the bystander jury instruction because there was no evidence to support this defense. 2003 WI App 162, ¶ 39.

"Before a federal court may overturn a conviction resulting from a state trial [based upon a defective jury instruction], it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten,* 414 U.S. 141, 146, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973). "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Id.* at 146-47 (citing *Boyd v. United States,* 271 U.S. 104, 107, 46 S.Ct. 442, 70 L.Ed. 857 (1926)). The Due Process Clause is violated if a jury instruction relieves the government of proving an element of an offense beyond a reasonable doubt. *Id.* at 147 (citing *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

Burr points to no evidence in the record to indicate that he was a mere observer. He simply argues that the jury could have inferred that Burr was a bystander on the basis that Paul Jackson had a motive to lie about Burr's involvement in order to protect himself. Such an argument is without merit. It was Paul Jackson that placed Burr at the scene and Paul Jackson that implicated Burr in the crime. If the jury was to conclude that Paul Jackson was lying to protect himself, the most logical inference

would be that Paul Jackson was lying regarding Burr being present at all, and not simply about Burr's specific actions.

Moreover, by refusing to give the bystander jury instruction, Burr was not denied the opportunity to present any particular defense, nor was the government relieved of proving any element of the crime beyond a reasonable doubt. The jury was provided the following instruction with regards to criminal liability as a party to the crime:

> Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime, although the person did not directly commit it and although the person who directly committed it has been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.
>
> A person is concerned in the commission of the crime if the person, (a), directly commits the crime, or, (b) intentionally aids and abets the commission of it, or, (c) is a party to a conspiracy with another to commit or advises, hires, counsels, or otherwise procures another to commit it.
>
> Such a party is also concerned in the commission of any other crime which is committed in the pursuant of the intended crime and which, under the circumstances, is a natural and probable consequence of the intended crime.

> This paragraph does not apply to a person who voluntarily changes his or her mind and no longer desires that the crime be committed and notifies the other parties concerned of his or her withdrawal within a reasonable time before the commission of the crime so as to allow others to withdraw.

(Ans. Ex. L at 23-24.)

The bystander portion of the party to the crime instruction reads as follows: "However, a person does not aid and abet if he is only a bystander or spectator, innocent of any unlawful intent and does nothing to assist the commission of the crime." (Pet. Br. at 48.)

A jury's conclusion that the state has proven all elements of a defendant's criminal liability as a party to the crime necessarily rejects the conclusion that the defendant was a bystander. The bystander jury instruction merely offers the jury arguably unnecessary explicit clarification if it was presented with appropriate evidence to justify the need for such clarification. The conclusion that there was no evidence in the record to support the claim that Burr was merely a bystander was not in error and it did not relieve the government of proving each and every element of the crime beyond a reasonable doubt. The jury was accurately instructed as to the elements of criminal liability as a party to the crime and the jury's verdict reflects its conclusion that the government proved each of these elements beyond a reasonable doubt. Therefore, this court is unable to conclude that the decision of the court of appeals was contrary

to or involved an unreasonable application of federal law as determined by the United States Supreme Court.

Sentencing

Burr alleges that information in his pre-sentence report that he was bully was inaccurate. (Pet. Br. at 52.) The court decided to strike the language but nonetheless, at sentencing stated that "[a]ll through school and his contact with other kids, he's been a bully." (Pet. Br. at 52.) The court of appeals found that the court's reference was harmless in light of the court's numerous other comments regarding the brutal nature of the crime, Burr's primary role, lack of remorse, anti-social tendencies, substance abuse, and the need to protect the public. 2003 WI App 162, ¶ 43.

Burr's first argument is that the court of appeals' harmless error analysis was contrary to the United States Supreme Court precedent regarding harmless error analysis, specifically *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). (Pet. Br. at 54.) The court of appeals stated the harmless error standard as "no reasonable probability." If one looks to the case cited by the court of appeals and, in turn, analyzes the cases cited in that case, one will find that the Wisconsin Supreme Court initially held that an error is harmless if there is "no reasonable *possibility*" that the error contributed to the outcome. (Pet. Br. at 54-55.) Burr argues that the substitution

of the word "probability" for "possibility" resulted in a legal error that warrants relief in this court.

This semantic argument is without merit. First, it is clear that the court of appeals used the terms "probability" and "possibility" interchangeably in its decision. *See* 2003 WI App 162, ¶ 29. Even if this court were to find that there was a legal distinction between these two words, such an inquiry would be irrelevant to this court's present purposes. The only relevant question is whether the court of appeals' decision was contrary to or involved an unreasonable application of federal law as determined by the United States Supreme Court? To this question, it is clear to the court that the answer is "no." Under *Chapman,* before an error of constitutional significance may be dismissed, the State must demonstrate that the error was harmless beyond a reasonable doubt. 386 U.S. at 24. Regardless of the specific word used, the court of appeals reasonably applied this standard in reaching its conclusion, and thus Burr is not entitled to relief on this ground.

Second, Burr argues that his due process right to be sentenced upon accurate information was violated. A criminal defendant has a constitutional right to be sentenced upon accurate information. *See United States v. Tucker,* 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *Townsend v. Burke,* 334 U.S. 736, 741, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948); *Theodorou v. United States,* 887 F.2d 1336, 1339 (7th Cir.1989). "[I]n order to show a due process violation, the defendant must raise grave doubt as to the veracity of the

information and show that the court relied on that false information in determining the sentence." *United States v. Eschweiler,* 782 F.2d 1385, 1387 (7th Cir.1986) (discussing Fed.R.Crim.P. 32(c)(3)(D)).

Having reviewed the transcript of the sentencing proceedings, (Ans.Ex.M), it is not entirely clear that the court's characterization of Burr as a "bully" was dependent upon the disputed and stricken information of the pre-sentence report. The word "bully" is necessarily somewhat ambiguous and thus it is quite possible that the court was making this characterization based upon any number of the other anti-social behaviors documented in the pre-sentence report. (*See* Ans. Ex. M at 26.) The conclusion that the court was not referring to the specific allegation in the pre-sentence report is supported by the fact that at sentencing the court stated that Burr had been a bully in part because of his interactions with other "kids," whereas in the pre-sentence report there was an allegation that Burr had bullied only a individual child. Further, the sentencing judge stated at the hearing on Burr's post-conviction motion that he did not base his sentence upon the information stricken from the pre-sentence investigation. (Ans. Ex. N. at 18.) Thus, Burr fails to demonstrate that the court relied upon erroneous information in imposing sentence.

Even if it could be determined that the court did rely upon the disputed fact that Burr bullied another child at school, and the information contained in the pre-sentence report was not true, it is clear that this

factor was just one of many that the court set forth in explaining its sentence. Even if this one factor was subtracted from the court's explanation of his sentence, it was clear that the court provided many reasons that adequately justify the sentence imposed. Thus, it is clear to the court that any alleged error did not have a substantial and injurious effect or influence upon the sentence Burr received. *See Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Therefore, this court is unable to conclude that the decision of the court of appeals was contrary to or involved an unreasonable application of federal law as determined by the United States Supreme Court.

Burr also alleges that the trial court improperly penalized him for exercising his right to self-incrimination. The pre-sentence investigation indicated that the author was unable to analyze issues of remorse or victim empathy because Burr had been advised by counsel not to comment on his version of the offense, because he intended to appeal and if a new trial was granted such statements may be used against him. (Pet. Br. at 58.) In sentencing, the court commented on Burr's lack of remorse and in sentencing other co-defendants, contrasted their remorse with Burr's absence of remorse. (Pet. Br. at 59.)

The respondent argues that Burr procedurally defaulted this claim by not fully developing it to the court of appeals. (Resp. Br. at 44.) Rather, Burr argued that the trial court erroneously exercised its

discretion and did not phrase the argument in constitutional terms. (Resp. Br. at 44.)

The court of appeals held that Burr was not punished for his exercise of his right to silence and the court did not give undue weight to Burr's lack of remorse in fixing the sentence. 2003 WI App. 162, ¶ 46.

Without resolving the question whether Burr procedurally defaulted on his claims by failing to adequately present the issue to the court of appeals, the court shall attempt to address Burr's claim upon its merits. This is, of course, somewhat difficult since the court of appeals did not specifically address the issue.

The Fifth Amendment's prohibition upon drawing adverse inferences from a defendant's silence is equally applicable in the sentencing phase of trial. *See Mitchell v. United States*, 526 U.S. 314, 327-29, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999). However, the Court's holding is limited to the circumstances of the case which is that courts may not rely upon a defendant's silence to determine facts of the case. *Id.* at 330. The Court expressly noted that the question of whether a defendant's silence may be considered in determining a defendant's lack of remorse, was not presented to the Court and thus it expressed no view on the matter. *Id.* In light of this explicit limitation on the Supreme Court's holding, Burr is unable to demonstrate that the decision of the court of appeals was contrary to any clearly established federal law as

determined by the United States Supreme Court. Therefore, the court shall turn to the question of whether the court of appeals' decision involved an unreasonable application of any clearly established federal law as determined by the United States Supreme Court.

When the judge stated during sentencing, "A very disturbing thing is that I have not seen one ounce of remorse or repentance in this case," (Ans. Ex. M at 29-30), the court was merely commenting upon the record as a whole; there is no indication that the court's observation that there was an absence of remorse was directly related to Burr's exercise of his right to silence. Although waiving his right to silence would have been one way to place remorse on the record, it certainly was not the only way. For example, the court noted that "Mr. Burr's demeanor at all times during this trial and at all times during his court appearances has been absolutely flat affect. I have not seen one winsing (sic) look. I have not seen one look of tenderness towards anybody on the stand." (Ans. Ex. M at 29.) The Supreme Court has explicitly held that such sentencing considerations are appropriate. *United States v. Grayson,* 438 U.S. 41, 50, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978) ("[W]e have acknowledged that a sentencing authority may legitimately consider the evidence heard during the trial, as well as the demeanor of the accused." (citing *Chaffin v. Stynchcombe,* 412 U.S. 17, 32, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973))). Thus, it appears that the court's conclusion regarding Burr's lack of

remorse rested upon circumstances other than Burr's exercise of his right to silence. Therefore, Burr fails to demonstrate that his right to against self incrimination was violated by the sentence imposed.

Moreover, in cases following *Mitchell,* federal courts have repeatedly held that a defendant's lack of remorse remains an appropriate sentencing consideration and such considerations do not impinge upon a defendant's right to remain silent. *See, e.g., Miller v. Walker,* 413 F.Supp.2d 251, 261 (W.D.N.Y.2006) ("It is well-recognized that a defendant's manifestation of remorse and his acceptance of responsibility for his conduct are proper factors to consider in sentencing. While the Fifth Amendment provides a safeguard against judicially coerced self-disclosure that extends to the sentencing phase of a criminal proceeding, it does not bar a court from considering a defendant's lack of remorse." (internal citations and quotation marks omitted)); *Bohan v. Kuhlmann,* 234 F.Supp.2d 231, 271 (S.D.N.Y.2002) ("While the Fifth Amendment provides a 'safeguard against judicially coerced self-disclosure' that extends to the sentencing phase of a criminal proceeding, it does not bar a court from considering a defendant's lack of remorse." (citing *Mitchell,* 526 U.S. at 322)); *El v. Artuz,* 105 F.Supp.2d 242, 255 (S.D.N.Y.2000) ("Although a defendant has a right to remain silent, a defendant's refusal to acknowledge any responsibility or to show any remorse in the face of clear evidence of wrongdoing is surely an appropriate factor for a sentencing judge to

consider when choosing an appropriate sentence from within a range of statutorily-permissible sentences.").

In light of the fact that all the federal court decisions that this court has been able to identify wherein the issue of the appropriateness of a sentencing court's consideration of a defendant's lack of remorse in light of the defendant's right to remain silent during sentencing, as recognized by *Mitchell*, have held that a lack of remorse remains an appropriate factor in fixing sentence, this court is unable to say that the decision of the court of appeals was an unreasonable application of clearly established federal law as determined by the United States Supreme Court.

IT IS THEREFORE ORDERED that, for the reasons set forth above, Jeffrey Daniel Burr's petition for a writ of habeas corpus is **denied**. The clerk shall enter judgment accordingly.

United States District Court, E.D. Wisconsin.

2007 WL 4561114

Jeffrey Daniel BURR, Petitioner,

v.

Warden Daniel BERTRAND, Respondent.

No. 04-C-992.

Dec. 21, 2007.

Earl P. Gray, Gray & Malacko Law Offices, Saint Paul, MN, for Petitioner.

Marguerite M. Moeller, Wisconsin Department of Justice, Office of the Attorney General, Madison, WI, for Respondent.

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY

AARON E. GOODSTEIN, U.S. Magistrate Judge.

On October 12, 2004, Jeffrey Daniel Burr ("Burr"), a person incarcerated pursuant to a state court judgment, proceeding with the assistance of counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On October 19, 2004, the Honorable Thomas J. Curran screened Burr's petition in accordance with Rule 4 of the Rules Governing Section 2254 Cases and ordered the respondent to answer the petition. This case was then transferred to this court upon all parties consenting to the full jurisdiction of a magistrate judge. On

October 31, 2007, this court denied Burr's petition on its merits and ordered judgment be entered accordingly. Currently pending before this court is Burr's request for a certificate of appealability ("COA").

Before he may proceed on appeal, the petitioner must receive a COA. 28 U.S.C. § 2253; Fed. R.App. P. 22(b). To obtain a COA, the petitioner must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

Burr requests a COA regarding only five grounds raised in his petition: (1) Burr's right of confrontation was violated when he was denied the opportunity to cross-examine an immunized state witness about whether the witness was aware that the charge he was avoiding carried a mandatory sentence of life in prison; (2) the trial court improperly excluded the prior statements of witness; (3) the court failed to instruct the jury that a person cannot be criminally liable for the actions of other is he is merely a bystander; (4) Burr's sentence was based upon false information; and (5) Burr was penalized at sentencing for exercising his right against self-incrimination. Burr acknowledges that he is not requesting a COA regarding two claims he raised in his petition: (1) the trial judge was biased against the defense resulting

in a violation of Burr's due process right to a fair trial; and (2) the prosecutor misstated evidence and testified during his closing argument which violated Burr's due process right to a fair trial.

For the reasons set forth in this court's prior decision and order resolving Burr's petition upon its merits, the court finds that Burr has failed to demonstrate a substantial showing of the denial of a constitutional right and has failed to demonstrate that jurists of reason could find debatable this court's conclusion regarding whether (1) Burr's right of confrontation was violated when he was denied the opportunity to cross-examine an immunized state witness about whether the witness was aware that the charge he was avoiding carried a mandatory sentence of life in prison; (2) the trial court improperly excluded the prior statements of witness; and (3) the court failed to instruct the jury that a person cannot be criminally liable for the actions of other is he is merely a bystander. Therefore, the court shall deny Burr's request as to these claims.

However, with respect to Burr's claim regarding the sentencing court allegedly relying upon inaccurate information in sentencing Burr, and that he was penalized at sentencing for exercising his right against self-incrimination, the court finds that Burr has met his burden in demonstrating that jurists of reason may debate whether this court's resolution of his petition was correct. Therefore, the court shall grant Burr's request for a COA with respect to these claims.

IT IS THEREFORE ORDERED that, for the reasons set forth above, Jeffrey Daniel Burr's request for a certificate of appealability is **granted in part and denied in part**. Burr's request for a certificate of appealability is **denied** with respect to his claims that (1) his right of confrontation was violated when he was denied the opportunity to cross-examine an immunized state witness about whether the witness was aware that the charge he was avoiding carried a mandatory sentence of life in prison; (2) the trial court improperly excluded the prior statements of witness; and (3) the court failed to instruct the jury that a person cannot be criminally liable for the actions of other is he is merely a bystander. However, Burr has satisfied the showing required under 28 U.S.C. § 2253(c)(2) with respect to his claims that (1) the sentencing court allegedly relying upon inaccurate information in sentencing Burr; and (2) that he was penalized at sentencing for exercising his right against self-incrimination, and therefore his request for a certificate of appealability is **granted** as to these two grounds.

Court of Appeals of Wisconsin.
STATE of Wisconsin, Plaintiff-Respondent,
v.
Jeffrey **Daniel BURR**, Defendant-Appellant.
No. 02-3250-CR.

June 24, 2003.

Appeal from a judgment and an order of the circuit court for Pepin County: Dane F. Morey, Judge. Affirmed.

Before CANE, C.J., HOOVER, P.J., and PETERSON, J.

CANE, C.J.

Jeffrey Daniel Burr appeals a judgment entered on a jury's verdict convicting him of first-degree intentional homicide, aggravated battery, and false imprisonment, all as a party to a crime. He also appeals an order denying his motion for postconviction relief. Burr argues he was denied a fair trial because of judicial bias and prosecutorial misconduct. He also contends several of the trial court's evidentiary rulings were erroneous and further claims the trial court erred when it refused to give the "spectator" portion of the party to a crime jury instruction. Finally, he argues the trial court erroneously exercised its sentencing discretion. We reject these claims and affirm the judgment and order.

BACKGROUND

¶ 2 On March 9, 2000, loggers found the dead, nearly naked body of Ronald Ross along a road in Pepin County. The investigation into Ross's death revealed that Ross had been at the Treasure Island Casino near Red Wing, Minnesota, on March 7 and 8. A surveillance videotape showed Ross talking to and eventually leaving the casino with a group of nine persons. Two of these people were identified as cousins Paul and David Jackson, who had registered at the casino hotel.

¶ 3 Police eventually contacted David at the casino, where he was an employee. He did not provide any information about Ross's death. David and Paul then contacted an attorney and subsequently told investigators that Ross had been murdered and offered to provide details in exchange for immunity. The police agreed, and the information they provided eventually led to fifteen-year-old-Burr's arrest, along with Noah and Arlo White.

¶ 4 At trial, Paul[1] testified that he went to a party at Noah's house in Red Wing early in the morning of March 9. Burr, the Whites, David and Ross were all at the party. Paul testified that he argued with Ross in the basement approximately two hours after he arrived at the party. Paul said he punched

---

[1] Paul was the only witness at trial directly connecting Burr to Ross's death. As a result, the subsequent facts are taken from his testimony.

Ross in the chin and knocked him to the floor. According to Paul, the party quickly began to break up and he went upstairs to "cool down."

¶ 5 Approximately forty-five minutes later, Burr and Noah asked Paul to go to the garage. Paul did, and in the garage he saw an unconscious Ross lying on the ground covered by a blanket. Paul testified that Burr then kicked Ross in the back and that they placed Ross in the back of Arlo's sport utility vehicle. Burr and Paul sat in the back seat, Noah in the front passenger seat, while Arlo drove to Wisconsin. On the ride, Burr said they should kill Ross and suggested slicing his throat. After entering Wisconsin, Ross regained consciousness. Paul said that Burr grabbed a sheathed machete and hit Ross with it for five minutes.

¶ 6 The men stopped the vehicle on a Pepin County logging road. Burr, Paul and Noah unloaded Ross from the vehicle, dropping him on the ground. Paul went back to the vehicle while Burr and Noah kicked Ross for several minutes and left him on the road. Back in the vehicle, Burr said, "We killed him." The men drove back to Minnesota. At trial, the Ramsey County, Minnesota, medical examiner who performed Ross's autopsy testified that the cause of death was multiple blunt force trauma and that hypothermia was a contributing factor.

¶ 7 The jury convicted Burr of first-degree intentional homicide, aggravated battery and false imprisonment, all as party to a crime. The court

imposed the mandatory life sentence for the homicide and made Burr eligible for extended supervision in sixty years. The court also gave concurrent fifteen- and five-year sentences for the battery and false imprisonment respectively. Additional facts will be added to the discussion where relevant.

Discussion

A. Judicial Bias

¶ 8 We first address Burr's claim of judicial bias. The right to a fair trial includes the right to be tried by an impartial and unbiased judge. ***State v. Walberg***, 109 Wis.2d 96, 105, 325 N.W.2d 687 (1982). Whether a judge was a "neutral and detached magistrate" is a question of constitutional fact we review de novo and without deference to the trial court. ***State v. McBride***, 187 Wis.2d 409, 414, 523 N.W.2d 106 (Ct.App.1994). There is a presumption that a judge is free of bias and prejudice. ***Id.*** In order to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased or prejudiced. ***Id.*** at 415, 523 N.W.2d 106.

¶ 9 The Honorable Dane Morey presided at the trial. In determining whether Judge Morey was actually biased, we must evaluate the existence of bias in both a subjective and an objective light. *See* ***id.*** The subjective component is based on the judge's own determination of whether he will be able to act impartially. ***Id.*** If Judge Morey subjectively believed

he would not be able to act impartially, he would have been required to disqualify himself from the proceedings. Under the objective test, we must determine whether there are objective facts demonstrating that Judge Morey was actually biased. *See* ***id.*** at 416, 523 N.W.2d 106. Under this test, Burr must show that the "trial judge in fact treated him unfairly." ***Id.*** Merely showing that there was an appearance of partiality or that the circumstances might lead one to speculate that the judge was partial is not sufficient. ***Id.***

¶ 10 In his motion for postconviction relief, Burr requested that Judge Morey recuse himself. Judge Morey denied the request, stating he had no bias at any time during the trial. He further noted that, as the judge who presided over the trial, he was the only judge who could hear the postconviction motions. Finally, Judge Morey said that in the event he granted a new trial, he would recuse himself. Burr argues that Judge Morey erred by denying the recusal motion on the basis that he was the only one who could hear the postconviction motion. He also contends that Judge Morey's statement that he would recuse himself in the event of a new trial implicitly admits his bias. We disagree.

¶ 11 Judge Morey refused to recuse himself primarily because he did not believe he was biased. Under the subjective portion of our analysis, we must then conclude that Judge Morey was not biased. *See* ***State v. Santana***, 220 Wis.2d 674, 684-85, 584 N.W.2d 151 (Ct.App.1998). We understand Judge Morey's comment regarding the requirement that he

hear the postconviction motion to address the timing of the recusal motion. Because Burr made his request as part of the postconviction motions, Judge Morey was being asked not to hear these motions. Under normal circumstances, the trial judge hears a defendant's postconviction motions. *See* WIS. STAT. § 809.30.[2] Further, we do not discern an implicit admission of bias in Judge Morey's statement that he would recuse himself if he granted the motion for a new trial. Instead, Judge Morey's comment appears to mean exactly what it says: that he would voluntarily recuse himself in the event he granted a new trial. The subjective portion of our judicial bias analysis focuses entirely on the trial court's own belief it acted impartially. We are bound by Judge Morey's conclusion.

¶ 12 We next turn to the objective portion of our review. Burr's approach to demonstrating Judge Morey's actual bias is to list several pages of trial transcript excerpts in the fact section of his brief,

---

[2] We note that the State argues that Burr waived his right to bring a recusal claim because the alleged improprieties happened at the trial and, as a result, the motion should have been brought then. However, the State also points out that a conviction must nonetheless be vacated if the trial judge should have recused himself regardless of any motion by the defendant. ***State v. Marhal***, 172 Wis.2d 491, 505, 493 N.W.2d 758 (Ct.App.1992). We therefore summarily reject the State's waiver argument.

All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

mostly involving objections and the court's decision and comments regarding them. In the argument section of his brief, he urges that these incidents, examined together, amount to a showing of bias. He does this without analyzing any of the specific incidents, and does not mention them in the argument section, other than to call them the "numerous incidents referred to on pages 4 to 12," or to refer to them by a phrase taken from a few of the examples or a brief description of the incident. Burr's claim of bias is somewhat an unattended conclusion, which we normally do not consider. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis.2d 239, 244-45, 430 N.W.2d 366 (Ct.App.1988). Further, we consider "for-reasons-stated-elsewhere" arguments to be inadequate and generally decline to address them. ***Calaway v. Brown County***, 202 Wis.2d 736, 750-51, 553 N.W.2d 809 (Ct.App.1996).

¶ 13 However, we believe it would be improper to summarily dismiss Burr's claim given the numerous instances Burr offers to show bias. Based on our review of these claims, we are satisfied that, as a whole, they do not amount to a showing of judicial bias. Because Burr briefly refers to a few of the incidents in his argument, we will limit our discussion to these claims to demonstrate our conclusion that the record does not establish judicial bias.

¶ 14 Two incidents that Burr suggests show the court had prejudged the case's merits are the court (1) saying the prosecutor's improper conduct "doesn't matter," and (2) implying that the prosecutor's

objectionable actions did not matter because the information was already before the jury. A review of these instances in context, however, does not reveal any prejudice.

¶ 15 In the first scenario, Burr's counsel objected to a question, but the witness answered before the court made its ruling. The court then said, "Sustained. It doesn't matter." Burr's counsel then moved to strike the answer and the court granted this request. The court's response that it "doesn't matter" appears to be a comment on the fact that the witness's answer was non-responsive and that she answered before the court was able to rule on the objection. In any event, the court struck her answer, and we cannot perceive how this ruling would contribute to any prejudice Burr suffered.

¶ 16 Nor can we discern any suggestion of bias in the second instance. There, Burr's counsel objected to nonresponsive testimony of a police officer on direct examination by the State. The court then ruled, "All right. It's already before the jury. I'll instruct the jury to ignore that." Again, the court sustained defense counsel's objection, and its comment merely notes that the improper information was already before the jury. The court then instructed the jury to disregard the answer. Jurors are presumed to follow the court's instructions. ***State v. Adams***, 221 Wis.2d 1, 12, 584 N.W.2d 695 (Ct.App.1998). We fail to see how these rulings could possibly demonstrate any prejudice against Burr.

¶ 17 Burr next argues the court ordered his counsel to stop objecting and limited his cross-examinations, both of which required him to choose between aggressively defending the charge and obtaining a fair trial. The only instance where we discern that the court told Burr's counsel to "stop objecting" was during the State's closing arguments, where Burr's counsel was repeatedly making objections that the argument was outside the evidence introduced at trial. The court told Burr's counsel, "Now, counsel, reasonably, he can argue and make reasonable inferences from the evidence in this case. And I'll ask you not to stand up and object every time a little something varies, because I will give reasonable latitude to you, as well as to him, in your closing argument." Examined in context, the court's ruling did not contribute to any prejudice against Burr. Instead, the court asked Burr's counsel to allow the State to conduct its closing argument, and informed him that he would receive the same privilege during his. Burr does not contend his counsel did not receive similar latitude or that the court otherwise erred by making this ruling.

¶ 18 Similarly, we are not persuaded that the trial court's limitation of Burr's counsel's cross-examination of Paul contributed to any prejudice. Burr points to numerous instances where the court sustained the State's objections during cross-examination and also to one instance where the court, on its own, told Burr's counsel to stop yelling at Paul. Again, Burr does not argue the court's rulings were

erroneous, nor does he offer any reason why the court on its own may not tell an attorney to stop yelling at a witness. These incidents do not reveal any trial court bias. Instead, the record reveals a highly charged murder trial, with a good deal of frustration between the court and counsel. A judge's bias against counsel must be sufficiently severe in order to translate into partiality against the defendant; antagonism or a strained relationship between counsel and the judge is insufficient. ***Walberg***, 109 Wis.2d at 107, 325 N.W.2d 687. Even had Burr further examined and analyzed the other alleged incidents of bias, we are satisfied the record reveals that the trial court exhibited no partiality against Burr.

B. Prosecutorial Misconduct

¶ 19 Next, we examine Burr's claim that he is entitled to a new trial because of prosecutorial misconduct. Much like his judicial bias argument, he points to numerous instances of alleged misconduct throughout the trial. Specifically, he contends the prosecutor engaged in misconduct by (1) improperly arguing during his opening statement; (2) making improper comments in response to witness testimony, such as "good," "thank you," and "that's right"; (3) eliciting testimony from Paul that he went along with the crime because he was scared, allowing the jury to draw the false inference that coercion is a defense to first-degree intentional homicide; and (4) improperly arguing in his closing. We determine that all but the last of these objections have been waived.

¶ 20 In order to preserve a claim of prosecutorial misconduct based on the remarks made at trial, defense counsel must object and make an immediate motion for a mistrial. *See* ***Sanders v. State***, 69 Wis.2d 242, 262-63, 230 N.W.2d 845 (1975). Although Burr objected to most, but not all, of the alleged instances of misconduct, he only moved for a mistrial after the jury had retired. Thus, we conclude that the only claim preserved for our review is that the prosecutor improperly argued in his closing.

¶ 21 Counsel enjoys wide latitude in closing arguments, subject to discretionary limitation by the trial court. ***State v. Draize***, 88 Wis.2d 445, 454, 276 N.W.2d 784 (1979)."The prosecutor may 'comment on the evidence, detail the evidence, argue from it to a conclusion and state that the evidence convinces him and should convince the jurors.'" ***Id.*** (citation omitted). When a claim of prosecutorial misconduct is raised, the test is whether the allegedly improper remarks "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' "***State v. Wolff***, 171 Wis.2d 161, 167, 491 N.W.2d 498 (Ct.App.1992) (citation omitted).

¶ 22 Burr's claim of prosecutorial misconduct suffers from the same shortcoming as his judicial bias claim; that is, while the brief's fact section contains numerous examples of alleged misconduct, the argument section does not incorporate these examples, except for a few tangential references. Thus, in our analysis, we will use a similar approach to the one taken in resolving Burr's judicial bias claim. Burr

argues that during the State's rebuttal, "the prosecutor endeavored to lend credence to the State's case by commenting on what attorneys, like Mr. Jackson's attorney, know and do. It was error for the prosecutor to basically testify as to the conduct of attorneys and as to the way plastic cards fly in the wind." This statement refers to two specific instances in the State's rebuttal.

¶ 23 In the first, it appears that the prosecutor was referring to a suggestion in Burr's closing and cross-examination of Paul that Paul's attorney helped him concoct his testimony in order to obtain immunity. The prosecutor said, "That's illegal. Attorneys don't do that," and later added, "What you don't have in this case is evidence of the lying lawyer. Like I said, it's illegal. His license and reputation goes. His freedom goes. He knows about immunity agreements." First, we note that Burr did not object to this testimony, although he argues it was because the court had admonished his attorney not to interrupt. Even if this incident was not waived, we conclude that the comment did not amount to misconduct. Although in isolation, "Attorneys don't do that" is arguably an improper argument because it resembles testimony, in context, the prosecutor is merely asking the jury to reject Burr's claim based on inferences from experiences within their common knowledge. We reject Burr's argument that this comment so infected the trial with unfairness to make his conviction a due process violation.

¶ 24 The second statement involves the prosecutor's comments regarding testimony that several of Ross's credit cards were found along the side of the road. Where they had been found suggested they had been thrown from a particular side of the vehicle on the way to the site where Ross's body was left, and this was inconsistent with Paul's testimony. During rebuttal the prosecutor said, "Where the cards ended up – If you can draw inferences that you think you can depend upon about which side of a car they got thrown out of, then you know a lot more about physics and wind dynamics, and whatever else, than I do. Because every time I've seen any little piece of plastic or – ." At this point, Burr objected, saying the prosecutor was testifying. The court sustained the objection, and said, "He has been instructed not to express his observations of anything." Burr successfully objected to this improper statement. The prosecutor was prevented from improperly testifying and we thus reject Burr's claim this constitutes prosecutorial misconduct.

C. Evidentiary Rulings

¶ 25 Next, we address Burr's claim that the trial court erred in several evidentiary rulings. Specifically, Burr argues the court erroneously (1) prevented his counsel from cross-examining Paul about the length of the sentence he avoided through his immunity agreement; (2) allowed the county coroner to testify that Ross's injuries were inflicted by more than one person; and (3) excluded David's out-of-court

statements. A trial court's decision to admit or exclude evidence is discretionary and we will not overturn absent an erroneous exercise of discretion. ***State v. Jenkins***, 168 Wis.2d 175, 186, 483 N.W.2d 262 (Ct.App.1992). A court properly exercises its discretion when it employs "a process of reasoning which depends on facts that are in the record or are reasonably derived by inference from the record, and yields a conclusion based on logic and founded on proper legal standards." ***State v. Hines***, 173 Wis.2d 850, 858, 496 N.W.2d 720 (Ct.App.1993).

¶ 26 The trial court sustained the State's objection to Burr's question to Paul whether he was aware that first-degree intentional homicide carried a life sentence as an attempt at jury nullification. Arguing jury nullification, or that the jury should acquit a defendant based on the fairness of the conviction rather than the law, is not permitted in Wisconsin. *See* ***State v. Bjerkaas***, 163 Wis.2d 949, 962, 472 N.W.2d 615 (Ct.App.1991). The State argued, and the court agreed, that Burr was attempting to introduce evidence of his potential sentence by asking Paul about the first-degree intentional homicide charge he avoided in exchange for his testimony.

¶ 27 Burr argues, however, that by excluding this questioning, he was prevented from fully exploring Paul's motives for testimony and denied his Sixth Amendment right to confrontation. When the State grants concessions in exchange for testimony by accomplices or co-conspirators implicating a defendant, the defendant's right to a fair trial is safeguarded by

(1) full disclosure of the terms of the agreements struck with the witnesses; (2) the opportunity for full cross-examination of those witnesses concerning the agreements and the effect of those agreements on the testimony of the witnesses; and (3) instructions cautioning the jury to carefully evaluate the weight and credibility of the testimony of such witnesses who have been induced by agreements with the state to testify against the defendant. ***State v. Nerison***, 136 Wis.2d 37, 46, 401 N.W.2d 1 (1987).

¶ 28 Burr relies on ***State v. Vogleson***, 275 Ga. 637, 571 S.E.2d 752 (Ga.2002). There, the Georgia Supreme Court determined a defendant's confrontation rights were violated when a trial court prevented him from questioning his accomplice about the benefit of his agreement to testify. ***Id.*** at 753-55. The accomplice agreed to testify in exchange for a ten-year sentence recommendation on a reduced charge, where he and the defendant were both initially charged with a drug offense that carried a twenty-five-year mandatory minimum sentence. ***Id.*** The Georgia court determined the defendant's right to inquire about the benefit of his accomplice's plea agreement included questioning about the sentence avoided, even if it was the same as that faced by the defendant. ***Id.***

¶ 29 We reject Burr's contention, however, because if the court erred by sustaining the objection, the error was harmless. An evidentiary error is harmless if there is no reasonable possibility it contributed to the defendant's conviction. ***State v. Dyess***,

124 Wis.2d 525, 543, 370 N.W.2d 222 (1985). The State argues that as common knowledge, the jurors would know that first-degree intentional homicide carries a lengthy sentence and perhaps would even be aware it has a mandatory life sentence. We agree. In fact, Burr's counsel admitted as much when asking Paul about his sentence when he said, "You are aware, however, that – I mean this is common knowledge. First-degree murder is a life-sentence. Are you not?" The jurors would know, at a minimum, that Paul was avoiding a lengthy prison sentence. This, along with the rest of Burr's cross-examination of Paul and the court's instructions to carefully consider testimony from immunized accomplices, satisfies us that there was no reasonable probability that Burr's inability to specifically question Paul about his potential avoided sentence contributed to Burr's conviction.

¶ 30 Burr next argues the court erred by admitting county coroner Dr. David Castleberg's opinion that it was likely more than one person inflicted Ross's injuries. Specifically, Burr contends Castleberg was not qualified to provide the opinion. We disagree. WISCONSIN STAT. § 907.02[3] governs expert witness

---

[3] WISCONSIN STAT. § 907.02 provides:

Testimony by experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

testimony. If specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, the witness may testify. ***State v. St. George***, 2002 WI 50, ¶ 39, 252 Wis.2d 499, 643 N.W.2d 777. This provision "continues the tradition of liberally admitting expert testimony" in Wisconsin. ***Id.*** Whether a witness "is qualified to give an opinion depends upon whether he or she has superior knowledge in the area in which the precise question lies." ***Id.***, ¶ 40 (citation omitted). Having a medical license does not automatically qualify a person to offer expert testimony on every issue in the field of medicine. ***Id.*** If the witness has no scientific, technical, or other specialized knowledge about the particular issues in the case, then the witness's opinion is not reliable enough to be probative. ***Id.***

¶ 31 Burr argues Castleberg was not qualified to answer the question because his medical training, general medical practice and work as a county coroner did not qualify him. He compares this situation to that in ***Lemberger v. Koehring Co.***, 63 Wis.2d 210, 216 N.W.2d 542 (1974). There, our supreme court determined that a trial court erroneously allowed a neurologist to testify that a construction worker's injuries could have been prevented if he had been wearing a hard hat. ***Id.*** at 217-18, 216 N.W.2d 542. The court determined that the neurologist had no specialized information about construction or the capacity of hard hats to prevent injury and, therefore, he should not have been permitted to testify that a hard hat would have prevented the worker's injuries.

Id. Similarly, Burr contends nothing qualified Castleberg to testify that more than one person inflicted Ross's injuries, because, for instance, Castleberg did not have any specialized training in determining the number of persons inflicting injuries and did not testify he ever examined a body that had been injured by more than one person.

¶ 32 We are satisfied that the trial court did not err when it allowed Castleberg's testimony. He testified that he had been a doctor for twenty-eight years and the county coroner for twelve. In his capacity as coroner, he said he received specialized training in death investigation, and had examined about 100 bodies. Based on these qualifications, and his work in examining Ross's body, the trial court could properly conclude that Castleberg was qualified to answer whether, based on his experience, it was likely that more than one person inflicted Ross's injuries. While the record does not reveal that Castleberg had any specific training in determining whether more than one person caused the injuries leading to a person's death, we are satisfied that the trial court did not erroneously exercise its discretion by admitting Castleberg's opinion based on his qualifications as a coroner.

¶ 33 We further note that Castleberg's testimony was not especially detailed. He explained his answer summarily, saying he based it on the multiple types and angles of the injuries, as well as "just the whole pattern" of injury Ross sustained. In addition, during cross-examination, Castleberg admitted it was

possible that one person could have inflicted the injuries. That Burr was able to call Castleberg's conclusion into question belies Burr's claim of prejudice based on the opinion's admission.

¶ 34 Next, Burr contends the court erred when it refused to admit David Jackson's out-of-court statements. Through defense witness Ashley Getty, Burr sought to introduce two telephone conversations between Getty and David. The defense claimed that David had called Getty from Ross's stolen cellular telephone on the night of the murder. In two subsequent conversations, David allegedly told Ashley to erase the telephone number from her cellular telephone. In the earlier conversation, David said the telephone was stolen and in the latter, he told her, "The guy whose number it was was killed." The trial court sustained the State's hearsay objection to these statements.

¶ 35 Burr argues the court erred because the statements were offered to show that David had knowledge that the telephone's owner had been killed, and therefore, were not hearsay. We agree, although we conclude the court's error was harmless. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. WIS. STAT. § 908.01(3). Burr's theory of these statements' relevance is that because David and Paul were very close, David must have learned about Ross's killing from Paul and this knowledge, as well as David's attempt to hide evidence, corroborates the defense theory that Paul was responsible for killing Ross. As the State

notes, however, Paul's role in the killing was not in dispute: it was established by his own testimony. We agree with the State's argument that, "Even if the jury were to draw all the inferences that Burr hoped they would draw from David Jackson's statement about the phone, that would be much weaker proof of Paul Jackson's involvement in the crime than what Paul Jackson's own testimony provided." The evidence Burr sought to introduce was established by other testimony. The court's exclusion of this evidence could not have contributed to Burr's conviction and was therefore harmless. *See* ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d 222.

D. Bystander Jury Instruction

¶ 36 Next, Burr argues that the court erroneously refused to give the "bystander" or "spectator" portion of the party to a crime jury instruction, WIS JI-CRIMINAL 400, which states:

> [USE THE FOLLOWING IF SUPPORTED BY THE EVIDENCE]
>
> (However, a person does not aid and abet if he is only a bystander or spectator, innocent of any unlawful intent, and does nothing to assist the commission of a crime.)

¶ 37 At the instruction conference, the court determined there was no evidence that Burr had been a bystander or spectator, and said it would not give that portion of the instruction. Burr argues that the court's ruling denied him of a defense because he

would have introduced evidence that he was a bystander had he known he needed to do so in order to have the jury so instructed. He claims the court's ruling unconstitutionally places the burden of showing an innocent presence at the crime scene on the defendant and relieved the State of its burden to prove the elements of a crime beyond a reasonable doubt.

¶ 38 A trial court has wide discretion in instructing the jury. ***State v. Coleman***, 206 Wis.2d 199, 212, 556 N.W.2d 701 (1996). Whether there are sufficient facts to allow the issuing of an instruction is a question of law we review de novo. ***State v. Mayhall***, 195 Wis.2d 53, 57, 535 N.W.2d 473 (Ct.App.1995). A court errs when it refuses to give an instruction on an issue raised by the evidence. ***Id.***

¶ 39 We conclude the trial court correctly refused to give the bystander portion of the instruction. The court's decision was based on the fact that there was no evidence to support the proposition that Burr was a bystander. The only evidence connecting Burr to Ross's death was through Paul, whose testimony described Burr's active role in the killing. Contrary to Burr's assertions, the State does not have the burden of proving that a person was not a bystander as an element of aiding and abetting. Instead, if there is evidence that the defendant was merely present at the crime and did nothing to assist or had any unlawful intent, the defendant is entitled to the instruction. There was no evidence of that here,

and the trial court did not err when it refused to give the bystander instruction.

¶ 40 It seems Burr expected that the bystander instruction would automatically be given, and because he had no notice that it would not, he claims he was unable to prepare a defense based upon it. We note that although the information was amended to include party to a crime on the last day of trial, Burr admits he was aware of the State's intention to proceed under this theory four months before trial. Had Burr wished to argue that he was a bystander, he had ample time to prepare his defense. The trial court's ruling did not deny Burr the opportunity to introduce evidence at trial that he was a bystander; it was made after the close of evidence. Burr should have been aware he was not entitled to the bystander instruction unless there was evidence to support it.

E. Sentencing

¶ 41 Finally, Burr claims the trial court erroneously exercised its sentencing discretion because (1) the sentence was based on inaccurate information; (2) the court gave too much weight to his failure to testify and his lack of remorse; and (3) sentence was unduly harsh. We reject all of these arguments.

¶ 42 Burr argues the court relied on inaccurate information that he had been a bully during school in determining its sentence. Burr's presentence investigation report included a statement that he had bullied a fellow student, but this was later stricken after

Burr's objection that it was false. At sentencing, however, the trial court noted that, "All through school and his contact with other kids, he's been a bully." It is well settled that a criminal defendant has a due process right to be sentenced only upon materially accurate information. ***State v. Lechner***, 217 Wis.2d 392, 419, 576 N.W.2d 912 (1998). A defendant who requests resentencing due to the circuit court's use of inaccurate information at the sentencing hearing "must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." ***Id.***

¶ 43 The State argues other information in the PSI supports the court's statement that Burr was a bully. We disagree. Although the report makes extensive references to Burr's discipline problems at school, antisocial behavior, and substance abuse problems, the only reference to bullying is the redacted portion of the PSI. Therefore, we conclude the court erroneously relied on that portion of the PSI when it sentenced Burr. However, we conclude the error is harmless. Once a defendant demonstrates a due process violation by clear and convincing evidence that he or she was sentenced on the basis of inaccurate information and that this was prejudicial, the burden shifts to the State to demonstrate that the error was harmless. ***State v. Littrup***, 164 Wis.2d 120, 132, 473 N.W.2d 164 (Ct.App.1991); ***State v. Anderson***, 222 Wis.2d 403, 410-11, 588 N.W.2d 75 (Ct.App.1998). The court's comments at sentencing focus primarily on the crime's brutal nature and

Burr's primary role, lack of remorse, antisocial tendencies, aggressive and violent nature, history of discipline problems, and substance abuse. The main issue at sentencing was determining when Burr would be released on extended supervision; the court was required to give him a life sentence. Given the court's other statements at sentencing, we are satisfied that there is no reasonable probability that the court's comment that Burr had been a bully resulted in a longer period of incarceration.

¶ 44 Burr next contends the court placed too much weight on his invocation of his right against self-incrimination by noting that Burr expressed no remorse for his crime. On the advice of counsel, Burr did not discuss Ross's death with the PSI author. At sentencing, referring to the PSI, the court noted, "This writer is not allowed to make a critical analysis regarding the issue of remorse and victim empathy, due to not being allowed to address the offense section," and later, "A very disturbing thing is that I have not seen one ounce of remorse or repentance in this case."

¶ 45 A court is prohibited from imposing a harsher sentence solely because the defendant refused to admit his guilt. ***Scales v. State***, 64 Wis.2d 485, 495, 219 N.W.2d 286 (1974). However, a sentencing court does not erroneously exercise its discretion by noting a defendant's lack of remorse as long as the court does not attempt to compel an admission of guilt or punish the defendant for maintaining his innocence. ***State v. Wickstrom***, 118 Wis.2d 339, 355-56, 348

N.W.2d 183 (Ct.App.1984). The weight to be given each factor is within the sentencing court's discretion. ***Id.*** at 355, 348 N.W.2d 183. A sentencing court misuses its discretion if it gives too much weight to one factor in the face of other contravening factors. ***State v. Steele***, 2001 WI App 160, ¶ 10, 246 Wis.2d 744, 632 N.W.2d 112.

¶ 46 We conclude the court did not place too much weight on Burr's lack of remorse. As noted, this is an appropriate consideration for a sentencing court, as long as it does not punish the defendant for maintaining innocence or attempt to compel an admission of guilt. Burr does not argue that either happened here. In addition, the court considered a wide variety of factors in making its determination, including the three primary factors: the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. ***Wickstrom***, 118 Wis.2d at 355, 348 N.W.2d 183. The court did not give undue weight to Burr's lack of remorse.

¶ 47 Finally, Burr argues his sentence is unduly harsh because his co-defendants received shorter sentences and he was much younger than they were at sentencing. He also argues that there was a significant disparity between his sentence and one received by a fifteen-year-old convicted of homicide in another case. We reject all of these arguments. "There is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences." ***State v. Lechner***, 217 Wis.2d 392, 427, 576 N.W.2d 912 (1998). The mere fact that someone

else who was convicted of the same crime received a lesser sentence does not make a sentence unduly harsh. *See* ***id.***

¶ 48 Here, Arlo and Noah White both pled guilty to first-degree reckless homicide, a less serious crime than first-degree intentional homicide. The offense to which they pled carries a lesser penalty and this alone justifies shorter sentences. Further, the trial evidence revealed that Burr was more culpable than the other defendants. Finally, we reject Burr's conclusory claim that his sentence was unduly harsh because a fifteen-year-old Washburn County boy convicted of first-degree intentional homicide was eligible for release on extended supervision in twenty years, rather than the sixty given here. Burr's reliance on a newspaper article about the boy's sentencing does not persuade us that Burr's sentence was unduly harsh. We therefore reject his argument.

By the Court. – Judgment and order affirmed.

STATE OF WISCONSIN	CIRCUIT COURT	PEPIN COUNTY

State of Wisconsin,
Plaintiff,

vs.

Jeffrey Daniel Burr,
Defendant.

ORDER

Case No. 01CF26

ORDER

(Filed Nov. 21, 2002)

Defendant's motions in this matter came on for hearing September 23, 2002. Defendant, Jeffrey Daniel Burr, was represented by Attorney Earl Gray and the State was represented by District Attorney Jon D. Seifert. After a full hearing on the issues and the Court being fully apprised of the circumstances therein, the Court hereby denies all of defendant's motions for the reasons set forth on the record.

Dated this 21 day of Nov, 2002.

/s/ Dane F. Morey
Honorable Dane F. Morey
Pepin County Circuit
Court Judge

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true

and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

State of Wisconsin CIRCUIT COURT BUFFALO/
BRANCH I PEPIN COUNTY

STATE OF WISCONSIN, Plaintiff, vs. JEFFREY DANIEL BURR, Defendant.	SENTENCING HEARING File No. 01-CF-26

The above-entitled matter coming on to be heard before the Honorable Dane F. Morey, judge of the above-named court, commencing on Wednesday, the 20th day of February, 2002, at approximately 9:04 a.m., in the courthouse in the City of Durand, County of Pepin, State of Wisconsin.

APPEARANCES.

Jon D. Seifert, District Attorney for Pepin County, Durand, Wisconsin, appeared as counsel for and on behalf of the State.

Earl P. Gray, Attorney at Law, St. Paul, Minnesota, appeared as counsel for and on behalf of the Defendant.

Jeffrey Daniel Burr, the Defendant, appeared personally.

[2] Whereupon, the following proceedings were duly had:

THE COURT: This is case number 01-CF-26, State of Wisconsin versus Jeffrey Daniel Burr. This is the sentencing hearing in this matter.

Where's Mr. Burr?

MR. SEIFERT: He's, on his way up, Judge.

THE COURT: I was informed everything was ready to go.

(Brief pause.)

MR. GRAY: Judge did you get this motion? I sent it Monday, and I told Carol to FAX it.

THE COURT: I received a letter motion that you made a long time ago but not any motion.

MR. GRAY: This was in connection with the Pre-sentence Report. I got the Pre-sentence Friday. I sent that Monday, and I didn't realize the post office didn't work on Monday.

That's my only copy. I told her to FAX it, also. But I was in court all day yesterday, and I didn't get her a chance to tell her yesterday.

THE COURT: Okay.

MR. GRAY: John has an extra copy, I guess.

THE COURT: Okay.

(Whereupon, the Defendant Jeffrey Daniel Burr enters the courtroom, at which time the following [3] proceedings were had:)

THE COURT: The appearances for the record, please?

MR. SEIFERT: Thank you, Judge. Jon Seifert appearing on behalf of the State of Wisconsin. The defendant, Jeffrey Burr, appears in person and by counsel, Earl Gray.

THE COURT: First of all, Mr. Gray, have you had an opportunity to go over the Pre-sentence Investigation Report with your client?

MR. GRAY: Yes, Your Honor. I received it Friday. I got it to him through his parents on Sunday, I believe. And I talked to him on Monday by telephone about the Pre-sentence Report.

THE COURT: All right. And are there any factual errors in the Pre-sentence Investigation Report that you wish to refer to me?

MR. GRAY: I did do a motion to delete portions of Jeff Burr's PSI or, in the alternative, an evidentiary hearing.

And Monday was a holiday, and I forgot about it being a holiday. And my secretary reminded me this morning that it probably didn't get here yet. So you received a copy of it.

Basically, on paragraph – or page eleven, with [4] respect to the incident regarding the fight, my client

tells me that he told the Pre-sentence Report writer that he pushed and not punched the boy that threw punches at him.

THE COURT: All right.

MR. GRAY: Which, in the Pre-sentence Report, it says "punched." It's important, I guess, to have an accurate Pre-sentence Report.

THE COURT: Surely.

MR. GRAY: The second – On page twelve, the second allegation is probably the most important one because my client adamantly denies what's stated in here.

I don't know – I haven't had enough time to talk to my client about the whole entire incident. So I don't know a lot about it myself, but he says that he denies that this happened.

I don't know where the Rush family's information – how the probation officer got that, when they wrote it, or what it's about even. And I move to delete that portion.

I think it's important, first of all, to delete these paragraphs from the Pre-sentence Report because it's been my experience that this report will follow him throughout his incarceration. And the first thing [5] anybody looks at when he's transferred is this report.

So it should be accurate. And anything that – Especially these Rush allegations should not be in there without our right to dispute it. So I object.

THE COURT: Well, you will have an opportunity, of course, to dispute it. And the Court will receive that information as disputed information and consider it as disputed information. But it is information that is furnished to the Court.

All right.

MR. GRAY: Okay. And I guess, with respect to that, I also – the motion is for an evidentiary hearing.

And, since this – If the Court considers this in sentencing him and leaves it in the Pre-sentence Report, I request an evidentiary hearing to allow myself for my client to cross-examine the – Rushes regarding this information.

The next page, thirteen, regarding the thousand a month. My client has no idea. He was asked to guess. And he guessed that. But that information is totally without foundation. And he has no idea.

THE COURT: All right. He is the beneficiary of trust fund money, but he is not aware of how much that is per month or how much he has there.

[6] MR. GRAY: Not at all.

THE COURT: Okay. Thank, you.

MR. GRAY: With respect to pages fourteen, fifteen; and seventeen, the Perkinson report, what we dispute in there is the amount of alcohol consumed.

On page fifteen, with respect to my client saying he drank up to a case of beer a day or at a time, he tells me he never said that to anybody and that it's not true.

And, with respect to the patient smokes up to ten joints of cannabis a day, he tells me he never said that to anybody and it's not true.

With respect to he uses whatever drugs he can get his hands on – This is a report coming out of an institution, I believe, out west someplace.

THE COURT: In Utah.

MR. GRAY: Yes. He disputes that. And we request those statements be deleted from the report.

And, finally, he started drinking when he was twelve, not eleven.

So that's – Again, the main issue that we have is with the Rush paragraph and respectfully request that that be deleted from the PSI, as it is without any foundation. And we request an evidentiary hearing on that issue if it remains in the PSI.

[7] That's all I have with respect to the accuracy of it, Judge.

THE COURT: All right. Rather than hold an evidentiary hearing, the Court will strike the Rush allegations from the Pre-sentence Investigation.

MR. GRAY: Thank you, Your Honor.

THE COURT: Then, at this time, the Court asks the State for its recommendation as to sentencing.

MR. SEIFERT: Thank you, Judge. Your Honor, under Wisconsin law, the Trial Court must consider three primary factors when exercising its sentencing discretion.

First is the gravity of the offense. Second is the character of the offender. Third is the need to protect the public.

With regard to the gravity of the offense, Mr. Burr has been found guilty of first-degree intentional homicide, along with aggravated battery and, false imprisonment. There is no crime more grave than first-degree intentional homicide.

In this instance, the victim was brutally beaten by the defendant on three separate occasions. It was a premeditated, brutal, and vicious crime.

Mr. Burr's character was not only revealed to the Court during trial but is also revealed in the [8] Presentence Investigation Report in the form of the diagnostic summary completed by Dr. Robert R. Perkinson of the Keystone Treatment Center.

I'm certain the Court is familiar with the details of this important resource and, therefore, will not repeat the language of Dr. Perkinson's report, with the exception to the last sentence of his narrative. "The patient has little sensitivity to the needs of others. He cannot connect immediately with others.

He tends to use other people for his own needs without guilt."

Finally, in the State's estimation, most importantly, there is the need to protect the public.

Mr. Burr has violated the most basic rule of human society. He has killed another human being. He has killed another human being brutally, viciously, and for no apparent reason.

The PSI reveals a long history of antisocial behavior and violence, of personality disorders, and chemical abuse.

Based upon the record, the State would submit that it is not only possible that this defendant would commit another violent crime if released into the community but it is a certainty.

Therefore, the State is in concurrence with the [9] Department of Corrections and joins in its sentencing recommendation, Your Honor.

I have not mentioned the devastating effect this crime has had on the victims. The Court has read their statements. And I will let them express their anguish directly to the Court when directed to do so by the Court.

In addition to the sentencing recommendations set forth by the Department of Corrections, the State requests the Court assess the following costs under Wisconsin Statute Section 973.06.

There are witness costs under Section 973.06(1)b)(c). Those total witness costs total four thousand seven hundred – $4,578.02.

THE COURT: Four thousand five hundred seventy-eight dollars five cents?

MR. SEIFERT: Four thousand five hundred seventy-eight dollars two cents, Your Honor.

THE COURT: Thank you.

MR. SEIFERT: Then there are the costs of the investigation under Section 973.06(1)(am)(2). That is the overtime costs expended solely on this investigation by the Pepin County Sheriff's Department in the amount of $15,803.40 and, also, the overtime expended solely on this investigation by the Goodhue County Sheriff's [10] Department in the amount of $5,043.68.

The total of those three figures, Your Honor, is $25,425.10.

In addition, Your Honor, there are the standard costs with relation to these crimes. First is the crime victim/witness surcharge of $70 for each felony, $210 total. The DNA surcharge of $250.

And then, continuing under the costs statute, Section 973.06(1)(g), ten percent of the restitution payable in this case. That ten percent figure is $709, which would make a total of those items of $1,169.

And, finally, Judge, there is the restitution for funeral expenses incurred by the family. And that total amount is $7,090.

THE COURT: All right.

MR. SEIFERT: Thank you, Judge.

THE COURT: At this time, Mr. Gray, you may make a presentation of recommendations of the defense in this matter. And you may present any persons that wish to address the Court concerning that on behalf of the defendant. And then the defendant can exercise his right of allocution after all of that.

MR. GRAY: Thank you, Your Honor. Your Honor, with respect to the last issue on these costs and restitution, I doubt if you can do it with respect to [11] witness fees but the costs that were joint, for example – Could that be – If somebody else be convicted in this case, that the liability be joint and several?

THE COURT: Yes.

MR. GRAY: All right. With respect to the sentencing factors cited by Mr. Seifert, there's no question it's a grave offense. But I would point out that he was convicted under the party to a crime and not as a principal.

With respect to his character, a long history of violence, I don't see that in the Pre-sentence Report. I see a history of alcohol and drug abuse.

But it appears to me that he has had trouble in school getting along, which is not unusual, particularly when you are a lot bigger than the other boys. You sometimes get more picked on than if you are smaller, especially if you are not quite as bright as everybody else.

He has no prior juvenile convictions for violence. He's got, again, a history of drug and alcohol abuse. And I'd ask the Court to take that into consideration.

The probation recommendation of 51 years is, in my history of practicing law, the first time that I have ever seen a recommendation based on a man's age. It's [12] not a proper consideration at all. Its not logical.

What that would mean is, if Mr. Ross was 20, we'd have a release at 20 years. It doesn't make any sense at all, Your Honor.

I'd ask the Court not to take that into account at all. I mean the man's age is just an improper consideration. And it just makes no sense.

Based on the fact that my client is 15 years old – He's a boy in a man's body, basically. He has no prior violent felonies. He shouldn't have at that age. I'd ask the Court to not take his whole life away from him and parole him after a recommended supervised release after 20 years.

We have given our statements in the report. We don't intend to talk to the Court anymore about that.

Thank you, Judge.

THE COURT: Do you have any persons from his family or in the tribe that wish to talk to the Court in this matter on his behalf?

MR. GRAY: The parents have given a telephone statement to you, Your Honor. A relative has. And we have decided that – It's been my experience that the Court has made up its mind already anyway. But I understand.

And the family is here in support of him. They [13] all believe in him. They're all traumatized by this, as I'm sure the victim's family is. It's a tragedy on both ends to see a 15-year-old boy convicted of first-degree murder. And the Court is aware of that.

THE COURT: Yes.

MR. GRAY: They don't intend to give any statements.

Thanks, Judge.

THE COURT: Mr. Burr, Jeffrey, you have a right of allocution, which is the right to address this Court personally before I sentence you.

Is there anything that you would like to say personally to the Court?

MR. GRAY: He's remaining silent, Your Honor, because of the appeal.

THE COURT: All right. That's his right, also.

Then, at this time, any victim statements will be presented to the Court.

MR. SEIFERT: I believe there are, Judge.

THE COURT: Identify yourself for the record and then proceed.

MS. KARI ROSS: My name is Kari, K-A-R-I, Ross, R-O-S-S.

The first thing I said when I found out that my [14] dad was the victim of a homicide was to ask the question, Why? What happened? And now, eleven months later, I'm still asking that question.

I thought, by coming to this trial, I would get my answer. But, instead, all I heard was a lot of yelling. All I saw was pictures of my father brutally beaten. And all I was told was to try and not show any outward emotion in the courtroom.

So every day, when I came into the courtroom, I said a prayer that God was able to heal the wounds that Jeffrey inflicted upon my father.

But, once I entered the courtroom, I looked at the hands and the feet of the defendant. And, if I looked close enough, I could still see my dad's blood.

And, at night, when I close my eyes, I could hear my dad cry for help.

My father was 51 years old. He was six weeks away from walking one of his daughters down the aisle for the very first time.

This summer, he had promised to teach his grandsons to fish. And, because of Jeffrey, he had to break that promise to them.

I have two small boys who loved their grandpa very much. And they don't understand why he went away. It would have been a little easier to explain to them if [15] he was taken away for health reasons or a car accident or something accidental. But how do you explain to them that grandpa, who, in their eyes was a superhero, was taken away from them by some boys who had nothing better to do than to beat him to death? How do I explain to them that he was kicked and hit for over two hours?

I want to share with the Court a little bit about what I go through every day since this happened. My children don't have a father. So my dad stepped up and he was their father-figure. Doing so much as to take a whole year off of work to baby-sit them so I could work.

He was in the delivery room when I had my first son. And now they're lost without him.

My five-year-old started kindergarten this year, but he had to be removed after two weeks because he was afraid to be away from me. He thought I was

going to die, too. The school counselor said he was emotionally traumatized and he needed counseling. He's only five years old.

They have a thousand questions. "Did grandpa leave because he didn't love me anymore?" "Mom, grandpa promised me he would take us to Disneyland. Didn't he remember? Why did he leave before he took me there?"

Then my four-year-old asked, "Mom, can grandpa [16] hear me right now? Because I want to tell him I still love him."

And, last but not least, they ask me almost every day, "Mom, did it hurt when grandpa died?" And now Jeffrey has made me a liar to my children because I tell them, "No. It didn't hurt grandpa when he died."

And then I think to myself, When did it stop hurting him? After the tenth hit? Maybe the tenth kick to the head? Or did he feel every punch, every kick, and every hit of the machete and every broken rib that he had?

I was driving in the car one day. And I turned around, and my four-year-old was sobbing hysterically. And I asked him "What's wrong?" And he says, "I want my grandpa back. I just want to give him a hug, Mom." What am I supposed to say to that? Because the truth is I want his grandpa back, too.

The sad thing is they're going to learn one day what really did happen to their grandpa. And I put my hope and my trust into the court system and to

you, Judge Morey, that I will be able to tell them that they will never ever pass the animal that did this to their grandpa in the street some day.

Thank you.

THE COURT: Please state your name and your [17] relationship.

MS. CAROLE ROSS: My name is Carole Ross, C-A-R-O-L-E, R-O-S-S. Ron was my brother.

Ron and I were just a year apart in age, and we were close all our lives.

He was a wonderful man, a true companion in life, godfather to my only son, my only child. He was the center of our family. He was charming and loving and full of life. He was active in his community, at his church. He lived a life that was full of love. He raised four beautiful daughters. And he looked forward to helping raise his two grandsons.

For me, he was always there if I needed advice on raising my son, who was also fifteen. Advice on where to live. When I was offered a new contract in the work I do, he always helped me go through that. He was always there with the advice.

He was my confidante since childhood, a sure and steady force of unconditional love along life's paths. We shared a journey in this world. And he should be with me here now.

The special loyalty and pride I felt for my brother Ronny has not ended and it never will. I will always

miss his presence, his laughter, his stories, and his love that held us all together as a family.

[18] He had so much more to give in this world and so many more blessings to receive in this world.

Jeff Burr had no right to take that from him. Jeff Burr has torn out the heart of our family.

Some day I'll be able to remember just the good times and celebrate the joy that was Ronny's life. But not today. Today, and for all time, we have to deal with the horror of what Jeff Burr has done.

Memories of my brother's life will always be clouded by the brutality and the senselessness of his murder. We have to deal with the Courts, the trials, the hearings, and Jeff Burr's remorseless attitude here in this court.

We can't, as a family, get to a place where healing can begin. The pain Jeff Burr has caused my family is immeasurable.

Some of us are in counseling, grief counseling. Some of us are in therapy. Some of us can't sleep at night, can't find the will to see the future as anything other than more pain, more loss, more despair.

Some of us are so afraid of the senseless violence that Jeff Burr has brought into our lives that healing is years away.

We, as a family, are being as strong as we can be to get through all this. But faith is hard to sustain

[19] through the despair. And the possibility that one of us may lose our way is real.

The full measure of the damage done to my family can't be known for years to come.

That Jeff Burr is guilty and has shown no remorse for what he's done needs to be addressed, And that's why we're here today.

Jeff Burr murdered my brother. He did so with extreme cruelty. And his guilt has been proven here in this court. There is no doubt. He murdered Ronny to cover up an assault and robbery so he wouldn't get into trouble.

He didn't hesitate to take a human life. He attacked and beat a vulnerable man, who was a respected elder among the people.

That Jeff Burr is Dakota brings a special pain to me, as I am Dakota, too. That the people who did this crime against my brother are Dakota diminishes me in ways I can't even express.

I hope the shame of what Jeff Burr has done will follow him all of his life. But that is not enough of a punishment for what he has taken.

What I am asking the Court today is a simple thing. Take this burden from my family. Save us from the future burden of a parole hearing. Let the sentence [20] be life without parole. Guilty in 2002 is guilty in 2020 or 2030.

If there is a parole hearing sometime down the road, I'll be there. My family will be there. If I am no longer here on this Earth, then my son will go in my place. My nephews, my nieces – They will go in their parents' place.

Don't let the children in my family wait for a date in the future where these issues are revisited for Jeff Burr's benefit. My nieces, my nephews, and my son should not have to deal in the future with issues before the Court today.

You have the power to end this here and now. Please do so. Jeff Burr should never walk free in my lifetime. And he should never walk free in my son's lifetime.

Jeff Burr didn't need to kill my brother. He assaulted him and robbed him, but he didn't need to kill him. But he did. And he delighted in it.

He deliberately brutalized and tortured my brother for hours. And then he beat and kicked him to death.

These are the facts. This is the reality that I struggle with every day. This is the horror that Jeff Burr has brought into our lives.

[21] Please take this burden from my family so our healing can begin.

Thank you.

MS. KATIE ROSS: My name is Katie Ross. Ron Ross is my father.

My name is Katie Ross. And I'm here to tell you how the three kids have ruined my life forever.

Dad meant everything to me. And now he's gone. Exactly one month before my 21st birthday, he took him from me. It kills me to even look in the mirror every day because I look exactly like my dad.

My dad was always there for me and would do anything for me. I'm so lost without him. He didn't just take one life March 9. He took two. When he killed my dad, he also killed me. I can't remember the person I was before, but I know that she's never coming back.

His heritage doesn't, obviously, mean anything to him because, if it did, how could he kill one of his own?

Well, it meant a lot to my dad. And I can just imagine how he feels, knowing that something that meant so much to him also cost him his life.

Now, because of him, I don't have my dad to walk me down the aisle when I get married or see the birth of my children or to just be there for me, like he [22] always was.

He has ruined my life forever. Half the time, I don't even feel like living anymore.

Not only did he ruin my life, but he ruined my whole families'. My aunts and uncles lost their

brother. My cousins lost their uncle. My nephews and nieces lost their grandpa. My sisters and I lost our father. Most important, my mother lost her soulmate.

MS. SUE ROSS: My name is Sue Ross. I'm the wife of Ron. I am here to talk about the impact of what this has done to my life.

Ronnie and I have been together since we were 16 and 17. We fell in love immediately and married at 18.

We have four wonderful daughters. Ronnie was a big part of his girls' lives. He coached them in sports while they were growing up.

They always came to him with their problems and always wanted his approval with their decisions.

We also have two grandsons that idolize their grandpa very much. He was in the process of teaching them golf, how to throw a football, and how to catch a baseball.

Grandpa was a huge part of their life, as we did daycare for them and saw them on an every-day basis.

[23] A day doesn't go by that they don't ask about him and wonder if he's happy in Heaven. "Why can't we see him anymore? We just want to hug him one more time."

They go into his bedroom and come out with his suits on and say they want to grow up to be just like grandpa. They blow bubbles to him and fly balloons

up into the sky so that he can see them. And they say, "Here it comes, Grandpa. This one is for you." They fight over who'll sleep on his side of the bed.

Ronny also missed walking his first daughter down the aisle by six weeks. He would have been so proud. At least he got to help in the planning.

Christmas was his favorite holiday. He would go way out with toys and presents for the kids.

It was not that way this year. There was a huge emptiness.

We had plans to retire in ten years and travel, just to be together. We were still very much in love, even after 35 years.

We used to golf together three times a week. Our clubs are in the corner of the garage, never touched again since March 9.

We used to watch football together. I haven't had the TV on to watch a football game since March 9. We [24] would go to five or six pow wows a year. I haven't been to one since March 9.

My life will never be the same again, not since March 9, when he so brutally beat Ronnie and left him in the snow, naked, to die.

My dreams always have a dark cloud in them, thanks to Jeffrey Burr.

We raised our girls by the Golden Rule, for which I'm sure he's never heard. It is "Do unto others as you would want them to do to you."

And I am sure his day will come soon. I am left with a lot of unanswered questions. What was so terrible that Ronnie said or did to make him pick and beat him so brutally? How do we tell the grandsons when they grow up about the bad people who did this to their grandpa and why?

I walk around so confused, so lonely, and with a broken heart. My only consolation to all of this is, the night before he was killed, he called me and told me how much he loved me.

Ronnie was so proud of being a Native American. I just wonder what he's thinking now.

And I am sure Jeffrey Burr is looking at me and saying, "Wasechu." And I'm looking at him and thinking, "Murderer."

[25] THE COURT: Are there any other victim's family that wish to address the Court?

MR. SEIFERT: I don't believe so, Your Honor.

THE COURT: Okay.

MR. GRAY: Your Honor, before you pronounce sentencing, I neglected to request one thing. I called the place where he goes. Dodge, is it?

THE COURT: Yes.

MR. GRAY: I talked to them and asked them where he would go. And they told me that the Judge decides.

If you do, I would ask that you sentence him to a juvenile – I believe there's one or two of them in the state – a juvenile prison before the adult.

THE COURT: Thank you.

MR. GRAY: Thank you, Judge.

THE COURT: Sentencing in a serious criminal case is not very easy. And, in this particular case, the young man was fifteen years of age at the time he committed these horrible acts. Now he is sixteen.

The factors that the Court is to take into account in sentencing are many. One of them is past criminal history. Because of his youth, he has no past criminal history.

His history of behavioral patterns, though, are [26] shocking. All through school and his contact with other kids, he's been a bully.

And he has been involved in in-school discipline problems, disrespectful of authority, and exhibiting antisocial behavior ever since he was a young boy, according to the Pre-sentence Investigation.

Also, the psychological work-up, diagnosis, which took place before this act, is that he's alcohol dependent with physiological dependency.

He is cannabis dependent. He is nicotine dependent. And he has a conduct disorder, the childhood onset type. That's in axis one.

In axis two and three he has antisocial traits.

Axis four shows he's vulnerable to peer pressure.

The problems that he exhibited at the time he was tested was his inability to maintain sobriety outside of a structured facility.

This patient is chemically dependent to a variety of psychoactive chemicals. He has been through treatment before and is in relapse.

Conduct disorder, problem number two. The patient has had a chronic history of breaking the rules of society to get his own way. This will make it more [27] difficult for him to work a structured program of recovery.

Problem three, antisocial traits. The patient has little sensitivity to the needs of others. This will make it more difficult for him to connect with a recovery group.

Problem four, vulnerability to peer pressure. The patient hangs out with an alcohol and drug-abusing crowd. If he returns into this environment, he will be at a high risk for relapse.

The summary at the conclusion of the Presentence Investigation, which the Court ordered to assist it in making a rational sentence in this case, states as follows: Jeffrey's obvious issues with alcohol

and drugs, in addition to his lack of insight into the fact that he has a significant problem in this area, coupled with his aggressive tendencies present a serious threat to community safety.

Furthermore, the victim statements reveal the depth of their loss and the impact of Jeffrey's behavior on their entire family.

This was a brutal crime, which resulted in a human life being removed from loving family members forever.

This writer is not allowed to make a critical [28] analysis regarding the issue of remorse and victim empathy, due to not being allowed to address the offense section.

Finally, based on the victim information, this tragedy is magnified in terms of how it has affected the Native American community and, in particular, the Dakota people.

No one knew it before this trial, but I grew up in a community where my playmates in grade school were Native American boys.

I grew up in the Spooner/Hayward area. One of my best friends is Jimmy Steinfeld. One of the smartest girls in my high school graduating class was Carol Taylor, in the top seven of the class and grew up in a very difficult situation.

So this is a terrible insult to the Dakota people, not just to the family of the victim. Everyone involved here are victims.

This is a vicious, aggravated crime. And Jeffrey Daniel Burr's responsibility for it is one hundred percent.

The testimony at the trial is that he is the one that beat Mr. Ross with the machete. He is the one that hit him with the machete in the vehicle so that blood squirted out and went inside of a speaker with such [29] force in the back of the vehicle. He is the one that helped lift his body, still alive, out of the vehicle and kicked it – kicked him and left him to – with only a pair of briefs on his body in five-degree-above-zero weather in the snow to slowly die from exposure.

This is certainly a vicious and aggravated crime. But it shows what drugs and alcohol can do to young people and how absolutely insane an act takes place as a result of that.

Mr. Burr's demeanor at all times during this trial and at all times during his court appearances has been absolutely flat affect. I have not seen one winsing look. I have not seen one look of tenderness towards anybody on the stand.

That may be part of his training as a child, to not show emotion on the face. But it is very disturbing.

His education is unremarkable, except he has struggled in school and he has had trouble conforming with school rules. He's been in and out of trouble in the schools all of his life. That is shown by the Presentence Investigation.

His employment record is that, much because of his youth, it's just odd jobs.

A very disturbing thing is that I have not seen [30] one ounce of remorse or repentance in this case.

The rights of the public demand that Jeffrey Burr be severely punished and his ability to circulate among his fellow mankind extremely limited.

The law requires that he be sentenced to life imprisonment on Count 1. The Court has no discretion in that regard, except as to when he is eligible to apply for extended supervision.

There are three options that the Court has in that regard. One, his eligibility for release to extended supervision after serving 20 years. A minimum time of full incarceration in the prison system is 20 years.

The next category is that he is eligible for release to extended supervision after a number of years that this Court would decide.

And the final category is that he is not eligible for release on extended supervision ever.

As you might think, this is a very tough decision to make when dealing with a 16-year-old boy.

This Court's decision, in regard to Count 1 as to the first-degree murder, is that he shall be eligible for release to extended supervision after 60 years.

He will be 76 years old at that time. But he will still be under intensive supervision by the [31] Department. If he steps out of line at all during that time, he will be right back in prison again.

There has been a recommendation of 51 years that was tied to the age of the decedent. I don't think that is a gauge for this, what Mr. Ross' life was.

But I do – The purpose of this length is to make sure that, if he ever is released, he will be an old man and won't be killing anybody else or harming anyone else.

The time you are confined, Mr. Burr, in prison can be extended if you violate any prison regulation or if you refuse or neglect to perform required or assigned duties.

If your time in prison is extended, under this bad-time provision, you could be required to serve up to the total length of your sentence in prison.

The penalties which can be imposed by the Department of Corrections are ten days for the first offense, twenty days for the second offense, and forty days for the third and each subsequent offense.

In addition, if you are placed in adjustment, program, or controlled segregation status, your term of confinement can be extended by a number of days

equal to 50 percent of the number of days which you spend in adjustment, program, or controlled segregation status.

[32] Finally, if, while you are in prison, you file a lawsuit which the Court finds to be filed for a malicious purpose or solely to harass the party against which it is filed or if you testify falsely or otherwise knowingly offer false evidence or provide false information to the Court in that lawsuit, the Court can order that your term of confinement be extended up to the total length of your sentence.

While you are on extended supervision, you will be subject to certain conditions. If you violate any of those conditions, you may be returned to prison to serve not more than the time remaining on your sentence, which is life.

The time remaining on your sentence is the total length of your sentence less any time served in custody.

You may file a petition for release to extended supervision with this Court. This petition cannot be filed earlier than 90 days before your extended supervision eligibility date.

If your petition is filed any time earlier than the 90 days, the Court will deny the petition without a hearing.

You must serve a copy of your petition on the District Attorney's office, and the District Attorney

[33] will file a written response to your petition within 45 days after receiving the petition.

The Court will review your petition and any response filed by the District Attorney and may grant or deny your petition.

If the Court holds a hearing, the hearing will be before the Court without a jury. The District Attorney who prosecuted you will represent the State at this hearing, if he is still alive and practicing law.

Before this Court can grant or deny your petition, any victim or any other person may make or submit a statement relevant to your release to extended supervision.

This Court cannot grant your petition unless you prove by clear and convincing evidence that you're not a danger to the public.

If your petition is granted, this Court may impose conditions on the term of extended supervision.

If this Court denies your petition, it will set a date on which you may file another petition. If it is filed prior to the date set by the Court, it may be denied without a hearing.

You may appeal an order denying your petition for release to extended supervision.

At this time, the Court will ask the chief [34] deputy to come forward and to deliver a copy of the written explanation of life sentence to the defendant.

The record will reflect that that has been delivered to him in this courtroom. And here is the form with the mark that I gave it to him.

The next matters are that of sentencing on Counts 2 and 3.

It is the decision of this Court that the sentences on these two counts be concurrent with the life sentence in Count 1.

The total length of your sentence on Count 2, which is aggravated battery, is for 15 years, the maximum.

Your initial term of confinement in prison is eleven years and nine months. The maximum time you will serve on extended supervision is three years and three months.

On Count 3, false imprisonment, your sentence is for five years, the maximum allowed by law.

The maximum time you will serve on extended supervision is one year and three months. And the confinement in prison is three years and nine months.

Again, on these two counts on the sentence, the time you are confined in prison can be extended if you violate any prison regulation or if you refuse or neglect [35] to perform required or assigned duties.

If your time in prison is extended under this bad-time provision, you could be required to serve up to the total length of your sentence in prison.

The penalties which can be imposed by the Department of Corrections are ten days for the first offense, twenty days for the second offense, forty days for the third and each subsequent offense.

In addition, if you are placed in adjustment, program, or controlled segregation status, your term of confinement can be extended by a number of days equal to 50 percent of the number of days which you spend in adjustment, program, or controlled segregation status.

Finally, if, while you are in prison, you file a lawsuit which the Court finds to be filed for a malicious purpose or solely to harass the party against which it is filed or if you falsely testify or otherwise knowingly offer false evidence or provide false information to the Court in that lawsuit, the Court can order that your term of confinement be extended up to the total length of your sentence.

While you are on extended supervision, you will be subject to certain conditions. If you violate any of these conditions, you may be returned to prison to serve not more than the time remaining on your sentence. The [36] time remaining on your sentence is the to total length of your sentence less an any time served in custody.

I further inform you that you are not eligible for Challenge Incarceration, commonly referred to as "Boot Camp."

If you are placed in and successfully complete the Challenge Incarceration Program, you would have certain options. But they are not applicable to you, first of all, because you are on a life sentence on Count 1 and, secondly, the Boot Program would not be appropriate in your case.

Again, the record will reflect that the defendant is furnished with a written explanation of the determinative sentence on Counts 2 and 3.

I'll ask the Chief Bailiff to give that to him in court. And the original is given to the Clerk of Court for the record.

Those sentences are concurrent with the sentence on Count 1, and they are concurrent with each other.

Furthermore, as to Counts 2 and 3, the Presentence Investigation Report states that Jeffrey Burr is the beneficiary of an allotment that goes into a trust fund held by the tribe of the Dakota Nation.

The best information the Court has is, [37] apparently, inaccurate information. But it is not denied by him either. That there is approximately one thousand dollars per month that comes into the trust fund for him.

The law does not allow this Court to create a lien on those trust funds for any fine or restitution or costs in this case.

If there are any elders of the Dakota Nation or tribe here, I ask that you do the right thing and, from his trust fund, pay these costs and these fines.

This Court is of the opinion that the fine on Counts 2 and 3 should be the maximum fine allowed by law in each case. And that is ten thousand dollars.

In addition to those fines, the witness costs of $4,578.02. That will be paid by the defendant.

And, again, I am asking the trustees of the fund for him to do the right thing and pay those costs from the trust fund.

The other costs of investigation, the standard costs, DNA testing, and the restitution for the funeral are to be paid by the defendant jointly and severally with all other persons who are convicted of this crime.

The costs include the amount of $709, which is the surcharge on the restitution for the funeral of $7,090. That cost gets paid directly to the Pepin County [38] Treasurer under the cost statute, as opposed to the other costs, which must go to the State.

In open court, I inform the defendant that you have the right to seek postconviction relief, which includes appeals in this court or in the Wisconsin Court of Appeals.

And it is your responsibility to decide whether you wish to do so. It is your trial lawyer's responsibility to assist you in making this decision and, if you

wish to seek postconviction relief, to file the necessary notice in this court.

If you wish to seek postconviction relief but cannot afford a lawyer, you have the right to request that a public defender be appointed to assist you.

To preserve your rights, a notice of intent to pursue postconviction relief must be filed within 20 days of sentencing.

If you have not already decided, you must do so within this period and inform your lawyer of the decision.

Your attorney must continue to represent you until a decision to seek postconviction relief or not is made.

If you wish to seek postconviction relief, your attorney must file the necessary notice within the 20-day [39] period.

In this particular case, I believe your attorney has already filed a letter motion with this Court asking for postconviction relief.

If you file a motion to modify sentence under Section 973.19 of the Wisconsin Statutes, you lose the right to appeal or seek postconviction relief.

I am, at this time, delivering to the Chief Bailiff for delivery to Mr. Burr and his attorney for completion of this form, which states, "We have discussed the decision to seek postconviction relief." And then check the following: "The defendant intends to seek

postconviction relief. The required notice will be timely filed by trial counsel. The defendant does not intend to seek postconviction relief. The defendant is undecided about postconviction relief but understands that the decision must be made and the trial lawyer must be informed of the decision so that notice can be filed within 20 days of notice. Trial counsel has counseled the defendant on the decision to seek postconviction relief and believes that the defendant understands the decision must be made and communicated to counsel so that the notice may be filed within 20 days of sentencing."

Mr. Gray, the Clerk has already filled in your name. So sign your name above where its filled in on [40] this form.

MR. GRAY: Sure.

THE COURT: In open court, deliver one of those. And give the other one back to the Clerk forthwith. He gets to keep a copy. Sign both of them and give him one of them. And one goes to the Clerk.

MR. GRAY: He has to sign it, too?

THE COURT: He has to sign it, also.

MR. GRAY: Okay.

(Brief pause.)

THE COURT: At this time, all parties who have a copy of the Pre-sentence Investigation Report are to return it for placing in the file, as it is confidential. So the Clerk has it in the file as well. We will

then take a 15-minute break and return for the postconviction motions.

MR. GRAY: Judge, with respect to that, I haven't filed any motions. That was a letter to you. It wasn't a motion. It says in there I intend to bring one. I'm not bringing –

THE COURT: (Interposing) Okay. I want to make sure that the Court understood what you did.

Here's what I have in my presence and what's been filed with the Clerk of Court. "Dear Judge Morey, after sentencing, I plan to bring a motion for a new [41] trial based upon the instructions to the jury. I objected to the party to the crime instruction because the evidence established, if believed, Jeff Burr was a principal, only and not a party to the crime. The Court overruled my objection to this instruction."

The Court sent a letter to you some time ago informing you that the postconviction motion, which I understood there to be, was to be heard today. We heard nothing from you.

MR. GRAY: I didn't file any motions. I cannot file any motions. That wasn't a motion. I can't file any motions until I file the notice and I review the transcript.

Any issues I raise in that motion that I don't raise I waive. And I'm not filing a motion because I don't want to waive any issues, Judge.

THE COURT: All right. It was unclear to the Court –

MR. GRAY: (Interposing) All right.

THE COURT: – whether you were making this motion by letter as opposed to another means.

MR. GRAY: All right.

THE COURT: And the Court was prepared to hear it. If you are not prepared, you have the right to take the time to study that and to have that motion.

[42] MR. GRAY: All right.

THE COURT: Then the Court does at this time – We'll take a – We will be done with this hearing. The next hearing isn't until one o'clock concerning one of the co-defendants.

But I am, at this time, remanding the defendant to the custody of the Sheriff for immediate transport to the reception center for the Wisconsin State Prison system.

I am recommending to them – to the Department of Corrections that this man be treated forthwith for his alcohol and cannabis problems and psychological problems so that he will better adapt to his situation in prison.

I leave it up to the Department of Corrections, after they test him, to make a decision as to where he should be placed.

So, Mr. Burr, you will spend the rest of your life in prison. It's a sad, sad day for this Court, for the victims, for your parents, and for your tribe.

That that completes this hearing.

MR. SEIFERT: Thank you, Judge.

(The proceedings were adjourned at 10:13 a.m.)

---

[43] STATE OF WISCONSIN)
) ss
COUNTY OF BUFFALO/PEPIN)

CERTIFICATE OF REPORTER

I, Jane M. Bohn, Official Court Reporter for the Circuit Court of Buffalo/Pepin Counties, Alma/Durand, Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of forty-two pages, has been carefully compared by me with my stenographic notes as taken down by me in machine shorthand and by me thereafter transcribed the same into typewriting, and that it is a full, true, and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this 27th day of February, 2002.

/s/ Jane M. Bohn
Jane M. Bohn
Court Reporter
RMR

State of Wisconsin CIRCUIT COURT BUFFALO/
BRANCH I PEPIN COUNTY

STATE OF WISCONSIN, Plaintiff, vs. JEFFREY DANIEL BURR, Defendant.	MOTION HEARING File No. 01-CF-26

The above-entitled matter coming on to be heard before the Honorable Dane F. Morey, judge of the above-named court, commencing on Monday, the 23rd day of September, 2002, at approximately 9:02 a.m., in the courthouse in the City of Durand, County of Pepin, State of Wisconsin.

APPEARANCES.

Jon D. Seifert, District Attorney for Pepin County, Durand, Wisconsin, appeared as counsel for and on behalf of the State.

Earl P. Gray, Attorney at Law, St. Paul, Minnesota, appeared as counsel for and on behalf of the Defendant.

Jeffrey D. Burr, the Defendant, appeared personally.

[2] Whereupon, the following proceedings were duly had:

THE COURT: This is the State of Wisconsin versus Jeffrey Daniel Burr, case number 01-CF-26.

This is a postconviction motion hearing in this case.

The appearances for the the record?

MR. SEIFERT: Jon Seifert appearing on behalf of the State of Wisconsin. Mr. Burr appears in person and with counsel, Earl Gray.

THE COURT: All right. The first matters we'll take up are the motions concerning a new trial. And the moving party then will commence.

Anything you want to add to your written argument?

MR. GRAY: Yes, Your Honor. For the record at least, I have filed a motion for recusal, which I assume was denied.

THE COURT: Well, I have to hear the postconviction motions. And then, if there's a new trial, I will honor your request for recusal.

MR. GRAY: I understand that, Your Honor.

THE COURT: So I am not recusing myself because there's no reason for me to recuse myself.

MR. GRAY: All right. The next – With respect to the exhibits, I would offer the exhibits in support of [3] my motion to modify sentence and motion for a new trial.

And, for the record, I'd like to go through them. Exhibit A is my affidavit. Exhibit B is the Bruno FAX on 2/28/02. Exhibit C is the Stahlke report that Bruno FAXed to me. Exhibit D is Noah White's statement of May 15, '02. Exhibit E is Noah White's signature regarding that report. Exhibit F is the plea and sentencing of Arlo and Noah White. And Exhibit G is a newspaper article regarding a 15-year-old who murdered his father and stepmother.

For the record, I would offer those exhibits in support of my motion for new trial and sentence modification.

THE COURT: All of them are received except for the newspaper article. It's irrelevant.

MR. GRAY: For the record, I, also, at the trial – And I call the Court's attention to page nine of our memorandum. The Court stated, "Mr. Gray, you may cross-examine, but you may not yell at the witness."

For the record, I deny that I yelled.

THE COURT: I'll tell you that you did yell, sir.

MR. GRAY: Well, I'd like to make my record, Your Honor.

THE COURT: And I have to make a record, too.

[4] MR. GRAY: I would not like to be interrupted.

THE COURT: Like I had to do at the trial, let me make one statement. The Judge runs the courtroom, not you. And –

MR. GRAY: (Interposing) For the record, I deny yelling. My voice may have been loud. People speak in different tones. Some are soft-spoken. Some are loud.

For the record, I did not deny it at the time because I did not think it was worthwhile in front of the jury. The witness didn't complain and the prosecutor didn't object.

With regard to my motion for new trial, I think the picture should be shown that I came down here with a Native American from Minnesota. I was a stranger to this area.

And, during voir dire, the people knew Mr. Seifert, knew yourself, were not stricken from the jury as long as they could be fair. There were social friends of both Mr. Seifert and the Judge on this jury.

So, when we started out, I was not on a level playing field.

Notwithstanding that, I cite in my memorandum 32 incidents where this Court either coached Mr. Seifert, interrupted my cross-examination, and made

comments about myself, which are stated in the memorandum.

[5] My client suffered from this. His trial – He did not receive due process because of these comments, because of cutting me off.

We didn't fully in the memorandum cite all of the cases, but one thing is clear in Wisconsin. When you have a one-witness trial, such as this, the lawyer has a right to an extensive cross-examination.

And every time I would ask a question that would be pertinent, I would get cut off. Not every time. That's wrong. Only the times cited in the brief.

THE COURT: That's your perception, sir.

MR. GRAY: The prosecutor, in his opening statement, made argument four times. I objecteded, as it was not proper courtroom procedure.

THE COURT: You know, sir, that opening statements are not evidence. And the jury was instructed that those are not evidence. Is that correct, sir? You have knowledge of that?

MR. GRAY: Yes. I acknowledge that they are not evidence. However, I also acknowledge that you are not allowed to argue in an opening statement.

THE COURT: Yes.

MR. GRAY: When I objected to that, not only Mr. Seifert – the Court said, well, both counsel

are not allowed to argue in opening statement. I had not even [6] made my opening statement yet.

THE COURT: Sir, I want you to understand that you were interrupting the opening statement of the other side. And that was intentional trial technique. And I had to be in control of the case, not you. And so that's why those rulings were made. And they were appropriate, rulings.

You may proceed.

MR. GRAY: I am making my record. The improper comment by the prosecutor thanking the witnesses. I objected. It continued. He went to, "That's right."

And then there's a comment by Seifert that that's just the way he was raised, along with – to the jurors. "That's just the way I was raised."

The prosecutor calls a relative of my client and, with absolutely no predicate, asked if she had any idea why this body was put near her property. There's no predicate for that. He had no evidence whatsoever that this poor lady was involved in this case at all. Now the jury has an inference that maybe she knew about it. That's an improper question that alone was misconduct.

THE COURT: Sir, what did that have to do with the case? She wasn't charged with any crime.

MR. GRAY: Now the jury thinks that she, also, an aunt of my client, is somehow involved. It's

[7] improper. It's misconduct to ask a witness without a predicate like that. And the Court knows that. It had nothing to do with the case.

THE COURT: So you know that this argument that you're making has nothing to do with this case.

MR. GRAY: It has nothing to do with the case, and that's why it's reversible error.

THE COURT: Sir, calm down. Take a deep breath.

MR. GRAY: I am calm, Judge.

THE COURT: Address the Court in a respectful, reasonable manner.

MR. GRAY: I am calm and respectful.

THE COURT: The record will reflect that he is speaking very loudly and glaring at the Court.

All right. Proceed.

MR. GRAY: Again, the prosecution, as was cited in the brief, creates a false inference that Paul Jackson only went along with this because he was scared.

I tried to provide evidence that that is not a defense to first-degree murder. And, of course, that was not allowed.

Now, the real classic here is in Mr. Seifert's argument. And this is on pages 30 and 31 – actually, 31 – of the brief.

[8] Mr. Seifert argued, "So there is no proof, no evidence that there was any lie from one hearing to the next. Mr. Gray just didn't want to tell you that he had been asked different questions."

Your comment, when I objected to that, was stating the prosecutor's – Despite that fact, there was evidence to show that Mr. Jackson lied. The Court overruled that objection but didn't stop there, stating the prosecutor's argument was within what's in the evidence.

Was it in the evidence, Judge, that I didn't want to tell the jury that he had been asked different questions? I don't think so.

THE COURT: Sir, as you know, closing arguments aren't evidence. And, as you also know, reasonable comments on the evidence by both sides is appropriate closing argument.

So you may proceed.

MR. GRAY: It's not appropriate, however, for a judge to say that's within the evidence when the prosecutor argues that I just didn't want to tell them what happened.

THE COURT: Okay. Please move on.

MR. GRAY: More objections, which I'm required to do under the law of Wisconsin. And I'm told that I [9] must sit down.

The prosecutor improperly testified during his final argument. And I cite that in the memorandum. I objected to that.

The cumulative effect of the Court in this case and its comments and its coaching and Mr. Seifert, taking full advantage of that, full advantage of the procedure, in view of the fact that the jury all knew the two individuals, the Judge and the prosecutor, and, as a matter of fact, some of them knew even better than that – You put all of that together and there's no question that this man did not receive a fair trial. Far from it.

The opinion of Schutt. The opinion of Castleberg. Getty's testimony regarding Jackson that I wasn't allowed to get into evidence. The spectator instruction. No objection by Mr. Seifert. However, the Judge decides right before final arguments to take it out.

Failure to disclose Stahlke. I get, after the trial, a report from Stahlke, which I requested in my discovery motion. I asked for all reports of experts. This report was wasn't disclosed. It wasn't disclosed, but the prosecutor had it. We know he had it because, in that report – because Stahlke was the one that found the [10] broken Newport cigarette. And you might remember that.

THE COURT: How is that exculpatory evidence, sir?

MR. GRAY: I'm pointing out that the prosecutor had it before.

The exculpatory evidence is the fact that Stahlke doesn't find two set of footprints there. That's the exculpatory evidence. If he would have disclosed it, I would have called Stahlke as a witness in this case. There's no question about it. Particularly, after Schutt's testimony.

The real controversy in this case wasn't tried. It wasn't tried because my client is that 15-year-old boy, although he might not look like it – Mentally, he's probably younger than that. He was unable to testify because of his fright.

And I had no prior warning that somehow this spectator instruction was an affirmative defense.

All of that just simply did not allow Mr. Burr to have a fair trial.

THE COURT: All right.

MR. GRAY: Going on to the sentencing –

THE COURT: (Interposing) We'll take just the new trial – motion for new trial. Well take up the modification for sentencing later.

[11] MR. GRAY: I will also state for the record that I received this morning a memorandum

from Mr. Seifert. I haven't read it because I got it at at twenty-five to 9:00.

My professionalism would have at least allowed me to get this a week or two ahead of time so I could respond to it.

Thank you.

THE COURT: Mr. Seifert, you may respond on the issues concerning a new trial only.

MR. SEIFERT: Thank you, Judge. It is true – And I apologized to Mr. Gray for not getting the memorandum to him sooner.

As the Court knows, I was gone until last week and had to get this together for him. I tried to FAX it to him on Friday, but Mr. Gray's secretary stated that their FAX machine was not working at that time.

The State did the best it could with regard to providing Mr. Gray with the memorandum in opposition.

The State doesn't have anything to add to that that hasn't been provided to the Court already in the memorandum.

THE COURT: Okay. First of all, the Court stands on the admissibility of evidence for my statements on the record. Those were sound rulings.

[12] The innocent bystander jury instruction – It states right in the jury instruction itself and the

instruction to the judge that it should not be given unless supported by the evidence.

There was no evidence in this case before the jury that anyone testified that Mr. Burr was an innocent bystander. Accordingly, the Court did not instruct the jury.

The Court must instruct the jury based upon the evidence in the case. The evidence in the case is not based on the instruction. It just turned around as illogical reasoning.

And failure to disclose the report of the forensic scientist Stahlke is no – in no way could have prejudiced the defendant because it is inconclusive. It is not exculpatory and would not have, in the Court's opinion, changed the result of this trial.

On the issue of newly discovered evidence, first of all, the statement of the defendant's cousin after the case was over and after he had made a deal with the State on a lesser charge, which is contradicted by this statement at his sentencing, is not only not newly discovered evidence, it is not newly available evidence of the statement of that co-defendant.

And that is *State v. Jackson*. And I'll cite [13] it. It's 188 Wis. 2d 187, Court of Appeals, 1994, Mr. Gray.

And that rule – And that was by Judge John Dimotto in Milwaukee, who is a very experienced criminal judge.

The defendant was aware of the possible testimony before the trial. And he had to have been there, where the co-defendant declined to testify. So that's, also, not newly discovered evidence.

So there is no newly discovered evidence on this case. And that is the significant matter. And so there's no new trial ordered on that ground.

As to the jury, the jury was selected. And you, sir, Mr. Gray, accepted the jury panel. You knew, when the trial commenced, that there were two alternate jurors. You knew that there was a risk that Mr. Ott may be one of the ones who were selected as an alternate.

The alternates were selected by lot by the Clerk of Court. And it just happened that Mr. Ott was the one – one of them that was selected.

Plus, there is no evidence whatsoever in this case that race had anything to do with the entire case, because the perpetrators and victim were all Native Americans and all strangers to this community and to this Judge.

[14] This Court had no bias in its head or, at any time during this trial. I didn't know any of the people involved, none of the defendants or – that were involved.

The jury, in a small community like this – The Court, of course, is familiar and knows who they are. None of them are friends of the Court, of the Judge. And it would have made no difference whatsoever.

I will tell you that, as I stated on the record, at sentencing that I grew up in a community and went to school where Native Americans were my friends. So don't try to poison everybody's mind in that regard because it's not proper.

Also, if there were judicial misconduct, your appropriate remedy was to file a claim of judicial misconduct with the Judicial Commission. There has been no such claim filed.

Then we'll proceed on into the – I believe I covered all those issues. It's the understanding of the Court that you have abandoned your letter that was sent to the press and filed with the Court at the sentencing time as to the amendment of the information being improper, because that is not included in your motion now. Because, as you know, it is appropriate for the District Attorney to do that.

[15] We'll now proceed into your motion to modify sentence on the basis that there's a new factor.

MR. GRAY: I never sent any letter to the press, Your Honor.

THE COURT: Somehow it got in there.

MR. GRAY: It wasn't me.

THE COURT: You stated you wanted more time, and you would do it at a later time And –

MR. GRAY: (Interposing) For the record, I never sent any letter to the press. And I have never been accused of it until right now.

I never entered race into this case. I never argued in any of the briefs that I ever accused you of any problems with race.

For the record, as far as the statement of Mr. Noah White, your statement today is that it's contradicted by his statement at sentencing. And I disagree with that.

THE COURT: Okay. Argue that to the Court of Appeals.

MR. GRAY: I intend to. We will go on to the sentencing. This is another classic example of the treatment that my client received from this Court.

In this – At the sentencing – Before the sentencing, I filed a motion for an evidentiary hearing [16] with respect to the allegations by a Rush that my client was a bully.

At the time of sentencing, the Court was aware of this motion. I told –

THE COURT: (Interposing) When did that motion come, sir? I didn't receive it, that I know of.

MR. GRAY: Yes, you did. I put on the record – I had filed it the day before. I had just gotten the PSI.

THE COURT: Sir, let's get by that. Because you remember and I remember that you brought that up at the sentencing hearing. I told you, rather than have an evidentiary hearing, I will disregard it. And I did not take it as a factor at sentencing.

MR. GRAY: That is not correct, Your Honor. Because you'll notice, in the first part of the sentencing transcript, I brought up the fact that I filed a motion.

You said you would strike that –

THE COURT: (Interposing) I did strike it.

MR. GRAY: No, you didn't. I received the PSI. And, also, in the sentencing, I pointed out to the Court that this PSI follows the defendant throughout his life in the prison. And I moved for striking that or an evidentiary hearing.

[17] The Court, rather than grant me an evidentiary hearing, struck it.

THE COURT: Yes.

MR. GRAY: However, on February 26, after the sentencing, I get a copy of the PSI and the Rush allegation is still in there.

THE COURT: That just means the Clerk's office didn't strike it out. You can take that up on appeal.

MR. GRAY: I'm not concerned about the appeal. What I am concerned about is that this paragraph, which I pointed out to the Court at sentencing that I wanted it stricken – Because I didn't want the fact that this person accused my client of being a bully hurt him when he –

THE COURT: (Interposing) All the Court can do is order it. And I followed your advice and ordered it.

MR. GRAY: The fact is that it wasn't stricken from the Clerk's file or in his prison record.

THE COURT: It is ordered stricken. It has been.

MR. GRAY: It might be –

THE COURT: (Interposing) Sir, please calm down. Because what you are trying to do – Because I have tried a lot of cases. You're trying to put the Court on the defensive. And I'm not going to take that.

[18] Proceed.

MR. GRAY: I'm just making a record. Although you ordered it stricken, it wasn't stricken.

Next, you sentenced my client on the fact that he was a bully.

THE COURT: That is incorrect.

MR. GRAY: You said that.

THE COURT: That is incorrect.

MR. GRAY: Well, it's in the record. I don't need to argue about it.

You said, "You have been a bully all of your life." That's what you said to him. It's in the record.

THE COURT: I'll stand on the record, as you must stand on the record, sir.

Proceed.

MR. GRAY: Thank you, Your Honor. And it's our position that you didn't strike that. That you considered the fact that the – of the Rush allegations.

And we argue that because – That is the only allegation in this whole PSI that would claim that my client was a bully, the only one.

Next, you state that he didn't have any remorse. He remained silent based on his lawyer's advice and based on the fact he was going to appeal.

Also, you don't consider this a new factor. [19] You say that Mr. Noah White's statement was contradicted by his sentencing – at his sentencing.

We don't agree with that. And that's a new factor.

THE COURT: I'll just tell you that is not a new factor. You know it isn't. It isn't a new factor because it's not credible.

MR. GRAY: I would like to finish my argument. I would like not to be interrupted.

THE COURT: I would like to rule on things, sir, as you bring them up. And I run the show, and you respond.

So I will tell you at this time that I made my rulings at that time. I stand by them. They were reasonable.

You may proceed.

MR. GRAY: Right. And so this is remindful, Judge, of the trial. Because, every time I start making a record, I get interrupted. And you've got everything in the paperwork.

All I'm asking is take your animosity out on me. You give a kid sixty years and –

THE COURT: (Interposing) Sir, what you are putting on is a show here. And I don't like that in my courtroom.

[20] Let's proceed.

MR. GRAY: Well, you know what? It's not your courtroom. It's the public's courtroom. And I have a right to represent my client. And I would just like to finish and sit down. And you constantly interrupt me.

THE COURT: Please proceed.

MR. GRAY: Thank you. In this courtroom, my client received a sixty-year sentence. He was a passenger in a vehicle that dropped a live body off that was driven by a guy who gets fifteen years. That's all he got.

That's all I have.

THE COURT: You may respond.

MR. SEIFERT: Yes, Judge. In the State's estimation, the Court's information on sentencing stemmed from all the information in the Pre-sentence Report allegations, not from the Rush allegations that were stricken.

On Mr. Gray's second point, remorse and repentance can be expressed other than by a self-incriminating statement in the courtroom.

On the third point, Mr. Noah White's statement is, as the Court has pointed out, self-serving. The State believes it's incredible. It certainly is inconsistent with the statement that was made at Mr. Noah [21] White's sentencing hearing. And, therefore, it does not constitute any new factor or new evidence.

And, fourth, the sentence was not harsh and unconscionable, given the brutal, senseless nature of the crime.

And the fact that – The State would submit that the public safety mandated it.

THE COURT: It's not easy to sentence anyone, especially in a first-degree case. And, in this case, of course, the sentence is a life sentence because that's mandatory under Wisconsin law.

I don't have any discretion in that regard. The only discretion I had in sentencing was when he might apply for extended supervision. And the Court exercised its discretion in that regard, based upon the

pretrial report and the victim/witness statements to the Court, which is appropriate, and Mr. Burr's absolutely flat affect during the entire trial and during the sentencing hearing.

And I expressed my reasons on the record. I expressed my reasons for the sixty years on the basis that he would be old enough when he got out that he couldn't hurt anybody else.

So it's a brutal murder. The testimony at the trial is that he is the one that beat this man repeatedly [22] with a machete as it drove over to Wisconsin.

No one would believe that a six-foot, 230-pound young man was along for no purpose in that ride to Wisconsin.

To lift an unconscious body out of a vehicle that was bleeding like crazy into the snow and leave that person to die from exposure in March.

So I believe I used my best judgment in sentencing in this case. And that is a matter for the Court of Appeals to handle.

And I believe that disposes of all of the motions.

The recusal is denied because the Judge who hears the case must rule on these motions.

That concludes the hearing. And you may proceed with the mechanics of the appeal.

(The proceedings were adjourned at 9:29 a.m.)

[23] STATE OF WISCONSIN)
) ss
COUNTY OF BUFFALO/PEPIN)

CERTIFICATE OF REPORTER

[23] I, Jane M. Bohn, Official Court Reporter for the Circuit Court of Buffalo/Pepin Counties, Alma/Durand, Wisconsin, do hereby certify that I reported the foregoing matter and that the foregoing transcript, consisting of twenty-two pages, has been carefully compared by me with my stenographic notes as taken down by me in machine shorthand and by me thereafter transcribed the same into typewriting, and that it is a full, true, and correct transcript of the proceedings had in said matter to the best of my knowledge.

Dated this 5th day of December, 2002.

/s/ Jane M. Bohn
Jane M. Bohn
Court Reporter
RMR